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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

IN THE MATTER OF BUNKER GROUP, INC., BUNKER GROUP PUERTO RICO, INC., NEW ENGLAND MARINE SERVICES, INC.,
Petitioners,

—v.—

UNITED STATES OF AMERICA, *et al.*,
COMMONWEALTH OF PUERTO RICO, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

On January 7, 1994 while en route from San Juan, Puerto Rico to St. John, Antigua, the tow wire between the Tug EMILY S and the Tank Barge MORRIS J. BERMAN parted resulting in the MORRIS J. BERMAN grounding on a reef off of Punta Escambron, San Juan, Puerto Rico, which caused a portion of its cargo of No. 6 fuel oil to spill into the water.

As a consequence of the above, owners of the Tug filed a complaint under the Limitation of Liability Act of 1851. Pursuant to Rule F(3) of the Supplemental Rules for Certain Admiralty Claims, the District Court issued an order which created a concursus of all claims in the limitation proceedings and enjoined the commencement of any actions outside the limitation proceeding. Subsequently, the District Court modified the order allowing, generally, the filing of late claims and the commencement of proceedings outside the limitation action in contravention of Rule F concursus provisions. The First Circuit Court of Appeals upheld this order.

Petitioners are the bareboat charterers and operators of the Tug EMILY S. This petition for a writ of certiorari presents the following questions for review:

1. Did the enactment of the Oil Pollution Act of 1990 (OPA 90), 33 U.S.C. §§ 2701-61 implicitly repeal Fed. R. Civ. P. Supp. Rule F when there is *no* mention of Rule F whatsoever in OPA 90 statute, the legislative commentaries and specifically no reference to the Rule F(3) provision for concursus?

2. Did the enactment of OPA 90 implicitly repeal all aspects of the Limitation of Shipowners Act of 1851, (Limitation Act), 46 U.S.C. App. §§ 181-96 as it applies to oil spills by vessels when OPA 90 only explicitly modified the Limitation Act's calculation of the amount of the limitation fund from the value of the vessel plus freight to one governed by statute; and modified the definition of owner/responsible party?

LIST OF INTERESTED PARTIES PURSUANT TO RULE 29.1

1. The Board on Environmental Quality of the Commonwealth of Puerto Rico
2. The Department of Natural Resources of the Commonwealth of Puerto Rico
3. Metlife Capital Corporation, Inc.
4. New England Marine Services, Inc.
5. Bunker Group Puerto Rico, Inc.
6. Caribbean Petroleum Corporation, Inc.
7. Global Insurance Company, SA
8. Utica Mutual Insurance Company
9. American Home Assurance Company
10. Reliance National Insurance Company
11. The Travelers Insurance Company
12. Westchester Fire Insurance Company
13. Royal Insurance
14. Reliance Insurance Company of New York
15. Royal Insurance Company of America
16. Continental Insurance Company
17. Certain Underwriters through Insco Marine, Inc.
18. Certain Underwriters Through Insco Marine Property & Casualty, Limited
19. Water Quality Insurance Syndicate
20. London & Hull Maritime Insurance Company, Ltd.
21. Axa T A/c
22. Yorkshire Insurance Co., Ltd. L A/c
23. Norwich Union Fire Ins. Society, Ltd. No. 1 A/c
24. Cornhill Insurance P/c D A/c, Phoenix Assurance P/c
25. Phoenix Assurance P/c Lsa A/c, Zurich re (Uk) Ltd.
26. Hansa Marine Insurance Company (Uk) Ltd.
27. Prudential Assurance Company Ltd. Trust A/c No. 2
28. Sphere Drake Insurance Plc No. 2 A/c
29. Dai Tokyo Insurance Co. (Uk) Ltd.
30. Anglo American Insurance Company Limited

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CITATIONS TO OPINIONS BELOW

The District Court order is not reported officially, but is contained in Appendix A and the opinion of the Circuit Court of Appeals for the First Circuit is reported at 132 F.3d 818 (1st Cir., 1997) and appears in Appendix B.

JURISDICTION

The underlying District Court action, *In the Matter of Bunker Group, Inc. et al.*, Civ. 94-1917, consolidated with *The Commonwealth of Puerto Rico, et al. v. The Emily S, et al.*, Civ. 94-1019 (CCN), was brought under the Limitation of Shipowners Act of 1851, 46 U.S.C. § 181 *et seq.* ("Limitation Act"), and Fed. R. Civ. P. Supp. Rule F for Certain Admiralty and Maritime Cases ("Rule F"). Accordingly, the jurisdiction of the District Court was founded on the court's admiralty and maritime jurisdiction under 28 U.S.C. § 1333.

Petitioners Bunker Group, Inc., Bunker Group Puerto Rico, Inc. and New England Marine Services, Inc. had appealed the District Court's order dated June 28, 1996 and entered July 12, 1996, modifying the injunction issued by the District Court dated August 25, 1994. The Petitioners' Notice of Appeal was timely filed on August 7, 1996. Since the District Court's June 28th Order modified an earlier injunction, the Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1292(a).

Petitioners have appealed the judgment in favor of Respondents entered on December 24, 1997, and now invoke the jurisdiction of this court pursuant to 28 U.S.C. § 1254(1) to request certiorari to review the judgment of the Court of Appeals for the First Circuit that was entered on the date above mentioned.

STATUTES, RULES AND REGULATIONS INVOLVED

33 U.S.C. §§ 2701-61; 46 U.S.C. App. §§ 181-96; Fed. R. Civ. Supp. Rule F for Certain Admiralty and Maritime Cases.

STATEMENT OF THE CASE

On January 7, 1994, the Tank Barge MORRIS J. BERMAN was being towed by the Tug EMILY S from San Juan, Puerto Rico to St. John, Antigua when the tow wire parted and the MORRIS J. BERMAN drifted free from the Tug. The barge subsequently grounded on a reef off of Punta Escambron, San Juan, Puerto Rico. The grounding ruptured a number of the MORRIS J. BERMAN's cargo tanks spilling a large part of its cargo of no. 6 fuel oil into the water.

As a result of the grounding of the MORRIS J. BERMAN, and the ensuing oil spill, the Commonwealth of Puerto Rico ("Commonwealth") filed a damages action in the United States District Court for the District of Puerto Rico captioned *The Commonwealth of Puerto Rico v. M/V EMILY S, et al.*, No. 94-1019(CCC). The Commonwealth named numerous defendants in this action including: Bunker Group, Inc. ("BGI") and New England Marine Services, Inc. ("NEMS"), the bareboat charterers of the EMILY S; Bunker Group Puerto Rico, Inc. ("BGPR"), operator of the EMILY S; MetLife Capital Corp. ("MetLife"), the owner of the EMILY S; and the EMILY S *in rem*.[1]

On July 1, 1994, NEMS, BGI, and BGPR (collectively, the "Petitioners") filed a complaint under the Limitation of Shipowner's Liability Act of 1851 ("Limitation Act") seeking exoneration from or limitation of liability for claims arising out of the grounding of the Tank Barge MORRIS J. BERMAN. At the same time, MetLife, as owner of the EMILY S, filed a separate complaint under the Limitation

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[1] Numerous other civil actions were filed by private parties seeking recovery under a variety of theories for damages that were allegedly caused by the oil spill from the MORRIS J. BERMAN. These actions were either consolidated with the Commonwealth's action or were later dismissed. On January 7, 1997, the United States filed a separate action in the District of Puerto Rico seeking recovery of damages under the Oil Pollution Act of 1990 ("OPA 90"), and other laws. This lawsuit has also been consolidated with the Commonwealth's action.

Act. Pursuant to Rule F(3) of the Supplemental Rules for Certain Admiralty and Maritime Claims, the Court issued an order of injunction restraining the prosecution of claims. Pursuant to Rule F, this order created a concursus of all claims in the limitation proceedings by enjoining the commencement and/or further prosecution of any actions against the Petitioners with respect to the grounding of the MORRIS J. BERMAN outside of the limitation proceedings. Thereafter, numerous claimants filed claims in the limitation proceedings, including the Commonwealth of Puerto Rico and the United States, seeking recovery of damages under OPA 90 and general maritime law. The claims filed by the United States and the Commonwealth assert that their OPA 90 claims should not be subject to the concursus.

Three other claimants, Hilton International of Puerto Rico, Inc., Puerto Rico Tourism Company and Hotel Development Corporation each filed a petition and/or motion[2] with the District Court generally seeking an amendment to the District Court's August 25, 1994 notice and order to allow, generally, the filing of late claims in the limitation proceedings, and also requested that the District Court stay the limitation proceedings pending the resolution of Hilton and Tourism's administrative claims before the National Pollution Funds Center ("NPFC").

On June 28, 1996, in deciding the above three claimant's petition and/or motion, the District Court issued an order, which was entered on July 12, 1996, and which suspended the August 25, 1994 "Order of Injunction" issued in the limitation proceedings "to the extent that it stays any claims for oil spills removal costs or damages resulting from or in any way

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[2] The Puerto Rico Tourism Company and the Hotel Development Corporation each initially filed a Petition for Dismissal or Stay of Proceedings. Hotel Development Corporation also filed a joint motion with Hilton International of Puerto Rico, Inc. to Amend Order and Notice, to Stay Proceedings, or in the alternative, to relax the Monition Period. The Order by the District Court dated June 28, 1996 ruled on all the above.

connected with the grounding of the Tank Barge MORRIS J. BERMAN on January 7, 1994." Petitioners contend that the District Court erred in entering this order.

On August 7, 1996, the Petitioners and MetLife timely filed an appeal of the June 28, 1996 order. The Appellate Court upheld the Order by its decision dated December 24, 1997, in which the Court held that "we find that the OPA 90 has repealed the Limitation Act as to oil spill pollution claims under the OPA 90 in the instant case." The Appellate Court erroneously reasoned that since OPA 90 explicitly precluded application of the Limitation Act regarding oil spills on the navigable waters of the United States, Rule F of the Supplemental Rules for Maritime and Admiralty claims, which is not even mentioned in OPA 90, must also have been repealed by OPA 90 by implication.

Prayer for a Writ of Certiorari

Petitioners pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the First Circuit entered in the above case on December 24, 1997, which Judgment affirmed the District Court's modification of the above-mentioned order dated August 25, 1994 and erroneously held that, based upon OPA 90's explicit preclusion of the application of the Limitation Act to OPA 90 claims, Rule F was also precluded by implication. Petitioners seek certiorari in accordance with Rule 10 of this Court which provides for a review of an appellate court opinion which "has so far departed from the accepted and usual course of judicial proceedings" or has affirmed such a departure by a lower court.

ARGUMENT

THE ENACTMENT OF OPA 90 DID NOT REPEAL FED. R. CIV. P. SUPP. RULE F OF CERTAIN ADMIRALTY AND MARITIME CLAIMS ("RULE F"), SINCE THERE WAS NO MENTION OF RULE F WHATSOEVER IN OPA 90 AND SPECIFICALLY NO REFERENCE TO THE RULE F(3) PROVISION FOR CONCURSUS.

In *The Quarrington Court*,[3] the Court comprised of Learned Hand, Augustus Hand and J. Chase stated:

> "the purpose of a limitation proceeding is not merely to limit liability but to bring all claims into concourse and settle every dispute in one section . . . . The general desirability of bringing all claims into concourse when once a limitation proceeding has been instituted and the plain jurisdiction of the court to effect such a result was clearly stated by the Supreme Court in *Hartford Accident Co. v. Southern Pacific Co.*, 273 U.S. 207, 215; 1927 A.M.C. 402, 406".

This principle has been shattered by the ruling of the First Circuit in this case, at least with respect to oil pollution incidents giving rise to claims under OPA 90. In its wake, the First Circuit has left an unworkable and ultimately harmful situation that will result in a multiplicity of lawsuits, inconsistent judicial decision, and deprivation of the substantive right to limitation which Congress has so clearly given to vessel owners and operators in OPA 90.

Petitioners do not challenge the First Circuit's holding that OPA 90 precluded application of the Limitation Act with respect to the amount of a shipowner's (or operator's) liability in the event of a pollution incident. Specifically, it is clear

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[3] *The Quarrington Court*, 102 F.2d 916 (2d Cir.) *cert. denied*, 307 U.S. 645, 1939 A.M.C. 421.

that the calculation of the limitation fund changes from the value of the vessel plus any pending freight (under the Limitation Act) to the limitation amount set forth in OPA 90. Additionally, OPA 90 expanded the definition of owner/responsible party to include third parties which are not owners of the spilling or discharging vessel, but which solely caused the spill. However, petitioners do challenge the First Circuit's unwarranted finding that since the Limitation Act is "repealed" with respect to claims arising from oil pollution incidents,[4] the procedural concursus for the marshaling of claims applicable to all admiralty matters under Supplemental Rule F is also therefore repealed by OPA 90. That holding goes too far. Rule F applies to all admiralty matters where limitation, such as is found under OPA 90, may apply. To abrogate the concursus procedure in such cases not only makes no sense, it may deprive the shipowner (or operator) of its substantive right to limitation of liability.

The origins of Rule F are found in this Court's promulgation in 1872, of Admiralty Rules 54-57[5], twenty one years after the original Limitation Act was passed. The Admiralty Rules were redrafted in 1920.[6] The Admiralty Rules essentially remained unchanged during the modifications of the Limitation Act in the 1870's[7] and of 1936.[8] However, it should be noted that Admiralty Rule 51 was largely superceded by the 1936 Amendment when the Amendment extended the time for an owner to commence a limitation

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4 132 F.3d 822.

5 Admiralty Rules 54-57, 80 U.S. pp. xiii-xiv (1872).

6 Actually, the Admiralty Rules 51-55, as numbered, were promulgated by the Court on December 6, 1920 and simply recodified the 1872 Admiralty Rules. See Order of February 28, 1966 § 4, Orders of the Supreme Court Adopting And Amending Rules.

7 See *supra*, footnote 5; see also Revised Statutes, 1874 (R.S. 4281-7 & 4289).

8 Act of June 5, 1936, c.521, 49 State at L. 1479; 1936 A.M.C. 920.

action from three to six months and modified the rule regarding the posting of security. In 1966, by Congressional Order,[9] this Court consolidated the Federal Civil Procedure Rules with the Admiralty Rules of Procedure which was then adopted as law. Thus, Supplemental Rule F was born.

From its inception in 1966, the plain meaning of Rule F clearly shows that this Court never meant Rule F to be solely applicable to the Limitation Act. In fact, Rule F was a merger, reconciliation and expansion of the Admiralty Rules #51-54, the 1936 modification of the Limitation Act and was intentionally broadened to encompass further modifications to the Limitation Act as well as any supplemental related acts.[10]

The Court below concedes that Rule F, as drafted, is applicable to more than just the Limitation Act.[11] The "more general purpose for Rule F"[12] recognized by the court below means that *any* statute which limits liability in a maritime and admiralty context should follow Rule F. It does not matter whether the limitation is by statute under OPA 90,[13] under CERCLA,[14] under the Trans-Alaska Pipeline Authorization

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9 28 U.S.C. § 331 (1964 ed.)

10 For example, under Rule F(1) "not later than six months after receipt of a claim in writing any vessel owner may file a complaint in the appropriate district court, as provided in subdivision (9) of this rule, for limitation of liability *pursuant to statute* . at the owner's option, [owner] shall transfer to a trustee to be appointed by the Court, for the benefit of the claimants, the owner's interest in the vessel and pending freight, together with such sums *or approved security therefore, as the Court may from time to time fix as necessary to carry out the provisions of the statutes as amended.* [emphasis added].

11 "In redrafting the rules, the Supreme Court substituted a direct reference to the 1851 statute in Rule F with "pursuant to statute" language which we find reveals more general purpose for Rule F". 132 F.3d 818, 822.

12 *Id.*

13 See 33 U.S.C. § 2701-61.

14 See 42 U.S.C. § 9601 et seq.

Act[15] or any other similar act. They all would fall under the procedural structures of Rule F subject, of course, to any explicit modification or preclusion of the application of Rule F by statute. No such modification or preclusion of Rule F appears in OPA 90.

Although the First Circuit finds conflicts between Rule F and OPA 90 with respect to venue and the limitation period, these objections do not bear scrutiny, especially in light of the applicability of the Limitation Act to general maritime law claims, among others. Specifically, the Court below found that the forum requirement of Rule F, that the concursus be lodged in the Federal District Court where the vessel has been seized, or if the vessel has not been seized, in any district in which the owner has been sued, or in the absence of a prior seizure or suit, the district where the vessel is found, is more restrictive than the venue provisions for bringing claims under OPA 90. That may or may not be true. OPA 90 provides that venue is proper in any district in which the discharge of oil or injury or damages occurred, or in which the defendant resides, may be found, has its principal office, or has appointed an agent for service of process.[16]

However, even if venue is more restrictive under Rule F, that should not preclude application of Rule F procedure. To hold otherwise is to say that Rule F should never be applicable, since its venue provisions will always be more restrictive than the venue rights of claimants subjected to Rule F concursus. Certainly that is the case with respect to general maritime law claims, as well as to *Jones Act*[17] claims arising from seaman personal injury cases, which are the most common form of claims subjected to the Limitation Act and Rule F. Nevertheless, it is clear that the benefits of Rule F concursus, as well as its necessity in order to implement the

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15 See 43 U.S.C. § 1651 et seq.

16 33 U.S.C. § 2717(b)

17 46 U.S.C. § 688.

purposes and substantive rights of limitation of liability granted by statute, outweigh any inconvenience to claimants.

The same can be said for the Court's reasoning below that the Rule F monition period should not be applied to OPA 90 claims because the limitation period is more restrictive than that provided under OPA 90. Although the Rule F monition period may shorten the time in which to bring claims, giving claimants less time than they would otherwise be permitted under OPA 90, shortened limitation periods have routinely been applied in Limitation Act cases. This has never formed the basis of a challenge to the Rule F procedure under the Limitation Act, however. It is likely that this is because the District Court where the Limitation Act Complaint is filed always has the inherent power to extend the monition period, if the interest of justice so requires. In this way prejudice to any claimant is avoided.

Finally, the First Circuit noted the potential for prejudice to the United States' subrogation rights due to the time limitation of filing concursus claims. Surprisingly, the First Circuit found that extension of the monition period by the District Court would not cure this problem, stating:

> Moreover, even if the courts consistently enlarge the monition period for subrogation claims, in many instances, the limited fund established by the concursus procedure will already have been exhausted.[18]

This statement is surprising, and wrong, for two reasons. First, as long as the monition period remains open, the distribution of the limitation fund will not occur. The District Court simply would not adjudicate and direct payment of claims while the monition period was still open. Secondly, and more importantly, without a concursus procedure, any later-arising claims by the United States will almost certainly be shut out of recovery by exhaustion of the limitation amount in one or more of

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[18] 132 F.3d 818, 824.

the multiple litigations which the First Circuit decision allows. Simply put, the First Circuit decision allows, and in fact encourages, a race to the courthouse by claimants, which will likely prejudice (or defeat) the United States' subrogated claims. Since the first claimant to obtain judgment can collect up to the statutory limit from the vessel's owner or operator or guarantor, the race is over once the limitation fund is exhausted. Without a concursus, actions will be pending simultaneously in many different courts, with each claimant vying for the first judgment. Thus, the biggest problem for the United States with respect to its later subrogation claims is that the ability of claimants to proceed outside of any concursus, which the First Circuit decision allows, will exhaust the limitation fund before the government can even bring its claims to court. Far from prejudicing the United States' subrogation rights, concursus is the only way to preserve them.

Rule F Concursus

Far from being in conflict, OPA 90 and Rule F complement each other in many aspects. Indeed, the Courts have viewed the Limitation Act proceeding under Rule F as having two primary purposes, both of which are consistent with OPA 90:

1. to establish a limitation fund; and
2. to allow all potential claimants to get a fair hearing by the Court and to have the Court allow an equitable distribution of the limitation fund which will not cover all outstanding claims.[19]

Consistent with the foregoing, and with OPA 90, the purpose of concursus is to allow for the claimants, where the aggregate value of their claims exceed the limitation fund, to have a common forum from which to be heard. It also allows the Court to equitably distribute to each claimant its pro rata share of the

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[19] See *Maryland Cas. Co. v. Cushing*, 347 U.S. 409, 415 (1954); See also *The Quarrington Court*, *supra* at 423.

limitation fund. Moreover, it is important to bear in mind that the concursus is not solely for the benefit of the shipowner. The elaborate notice provisions of the Admiralty Rules are also designed to protect injured claimants.[20]

Like the Limitation Act, OPA 90 establishes standards for exoneration and limitation of liability with regard to oil pollution, and provides new limits of liability for such claims.[21] OPA 90 however, does not refer to a limitation procedure at all, nor does its legislative history, and OPA 90 provides no mechanism for the Court to manage claims or to distribute funds that might be available to claimants under OPA 90 if claims against the responsible party exceed the applicable OPA 90 limit. Rule F steps in to fill that gap.

The need for a concursus procedure to marshal all claims arising under OPA 90 is imperative. As stated earlier, Rule F concursus procedure was explicitly broadened by this Court to allow for its utilization in other limitation of liability

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20 *Id.* at 415, 417.

21 OPA 90, § 2704(a) states in pertinent part "except as otherwise provided in this section, the total liability of a responsible party under § 2702 of this title and any removal costs incurred by, or on behalf of, the responsible party, with respect to each incident shall not exceed—

(1) for a tank vessel (except a tank vessel on which the only oil carried as cargo is an animal fat or vegetable oil, as those terms are used in § 2720 of this title) the greater of—

(A) $1,200.00 per gross ton; or

(B) (i) in the case of a vessel greater than 3,000 gross tons, $10 million; or (ii) in the case of a vessel of 3,000 gross tons or less, $2 million;

(2) for any vessel, 600 per gross ton or $500,000, whichever is greater;

(3) for an offshore facility except a deepwater port, the total of all removal costs plus $75 million; and

(4) for any onshore facility and deepwater port, $350 million.

schemes. OPA 90 is a limited liability scheme and application of Rule F concursus procedure is essential for the proper management of the funds available to pay claims under OPA 90. Rule F concursus is the only way to ensure that all claimants will obtain a fair pro rata share of recoverable damages from a responsible party under OPA 90.[22] In the absence of concursus, there is a very real threat of multiple suits in multiple jurisdictions, races to the courthouse (and to trial and to judgment) by claimants, extreme waste of judicial resources, and conflicting judicial decisions on liability. The claimant that won the race to judgment and exhausted the limitation fund would effectively shut out the other claimants from recovery. And this is no matter how long the others had been in litigation. Once a responsible party has paid its OPA 90 liability limit, it should have no more liability to the claimants; whose remedy would then be to seek recovery from the supplemental compensation fund created by OPA 90. This fund is commonly known as the Oil Spill Liability Trust Fund which is managed by the NPFC. If that is not the case (and conflicting decisions in State and Federal District Courts may threaten the shipowner's ability to successfully assert a defense of limitation) then the substantive right of limitation will be lost.

OPA 90 Did Not Repeal Rule F By Implication

Just as Congress did not explicitly repeal Rule F, fundamental principles of statutory construction require a finding that it did not effect such repeal by implication. Repeal of statutory provisions by implication is strongly disfavored.[23] Generally, repeal is implied only when necessary to make a later enacted law work, and then only to the minimum extent

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[22] Note that claimants are not precluded from further recovery under OPA, however. If they only receive a portion of their claim from the OPA responsible party, they may apply to the NPFC for payment of the remaining amount due. *See* 33 U.S.C. § 2713(d).

[23] *See e.g., Tennessee Valley Auth. v. Hill,* 437 U.S. 153, 189 (1978).

necessary.[24] Thus, absent a clear and manifest intention by the legislature to repeal, when two statutes exist on the same subject, the rule is to give both effect if at all possible.[25] Indeed, no repeal will be implied unless the provisions demonstrate a mutual exclusivity, positive repugnance, or clear irreconcilability such that the two acts cannot have concurrent operation.[26] Absent such repugnance, courts should make every effort to reconcile the two acts and give effect to both so long as doing so does not deprive one or the other of its essential meaning.[27]

In this case, Rule F's procedure for concursus and OPA 90's liability provisions are entirely consistent and must both be given full effect. Although OPA 90 creates new limits of liability for damages resulting from oil pollution, it does not address the limitation procedures set forth under Rule F. Just as there was no explicit repeal of the concursus provisions of the Limitation Act, there is no "mutual exclusivity, positive repugnance, or clear irreconcilability" between the terms of OPA 90 and Rule F that would require implicit repeal of Rule F. Indeed, neither OPA 90 nor its legislative history provide a competing procedure for a responsible party to follow in order to assert limitation under OPA 90. Far from being inconsistent with OPA 90, the Rule F remains the only procedure that a responsible party and the Court can reasonably follow in attempting to assert and manage numerous claims under a limited liability scheme such as OPA 90.

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24 *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976). *See also Morton v. Mancari*, 417 U.S. 535, 550 (1974) (where in the absence of an affirmative showing of an intent to repeal, when two statutes or doctrine are capable of coexisting, it is the duty of a court to regard each as effective).

25 *United States v. Borden Co.*, 308 U.S. 188, 198 (1939).

26 *U.S. v. Hansen*, 566 F.Supp. 162, 164-165 (D.DC. 1983).

27 *Id.* at 165.

Furthermore, as noted above, OPA 90 expressly states that except where otherwise provided, OPA 90 does not effect existing admiralty and maritime law.[28] OPA 90, analagous to the Limitation Act, does not otherwise provide, and neither OPA 90 nor its legislative history address, the issue of limitation procedure. Thus, there can be no other conclusion but that Rule F's concursus procedure remains unaltered by OPA 90. And that Rule F remains applicable to OPA 90's limitation of liability scheme.

As a result of the decision below, any OPA 90 claimant can now file their claim in any court, and the claimant that gets to the right court and gets a judgment first will have first "bite of the apple" of a fund which may not cover all the legitimate claims. For the reasons set forth above, we ask this Court to grant certiorari to correct a clear error by the Court below. By ruling that OPA 90 supersedes both the Limitation Act *and* Rule F, the Courts below have discarded over one hundred years of *stare decisis*, much of which was set by this Court, and created a judicial morass.

THE ENACTMENT OF THE OIL POLLUTION OF ACT 1990 (OPA 90), DID NOT REPEAL THE LIMITATION OF SHIPOWNERS LIABILITY ACT SINCE OPA 90 ONLY MODIFIED THE LIMITATION ACT WITH RESPECT TO THE LIMITS OF LIABILITY AND THE DEFINITION OF OWNER/RESPONSIBLE PARTY

"OPA 90 Did Not Repeal the Limitation Act by Implication

> If Congress' intent in enacting OPA 90 had been to completely repeal the Limitation Act, it would not have painstakingly repealed it only with respect to certain types of actions. It is incomprehensible that Congress would have provided for express repeal of the Limitation Act under these limited circumstances if it had intended

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[28] 33 U.S.C. § 2751(e)(1).

> and implied repeal of the Limitation Act in all circumstances. These provisions will be mere surplusage if Congress had intended to totally repeal the Limitation Act."[29]

Notwithstanding the logic of Professor Duncan's foregoing statement, the below Court found that because of the explicit repeal by OPA 90 of certain narrow aspects of the Limitation Act, the entirety of the Limitation Act was implicitly repealed with respect to OPA 90 claims. That holding goes too far.

As was stated more fully above, the Courts strongly disfavor repeals by implication, unless the earlier statute is clearly repugnant or irreconcilable. Congress' intent to repeal must be clear and manifest and the Court will strongly presume that Congress will expressly address in the statute those statutes and sections it wishes to modify. As Professor Duncan stated above, had Congress wished to repeal the Limitation Act with respect to oil spills, it could have expressly stated so in the statute. Instead, Congress' intent to *not* repeal the entirety of the Limitation Act is therefore manifest in their actions where OPA 90 only modifies the Limitation Act with respect to the extent of the specific five subsections in OPA 90.[30]

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[29] W. Duncan, *The Oil Pollution Act of 1990's effect on the Shipowner's Limitation of Liability Act*, 5 U.S.F.L. Rev. 303, 319 (1993).

[30] 33 U.S.C.:

§ 2702(a) which repealed the Limitation Act only as to responsible parties;

§ 2702(d)(1)(A) which repealed the Limitation Act as to third parties who solely caused an oil spill;

§ 2718(a) which repealed the Limitation Act with respect to state and local governments imposing additional liability on any party;

§ 2718(c)(1) which repealed the Limitation Act with respect to the United States or any state or political subdivision thereof from imposing additional liability or additional requirements;

(*footnote continued*)

More importantly, when reviewed in light of its legislative history and purposes, it is clear that OPA 90 did not repeal the *procedure* set forth in the Limitation Act, and that Congress had no intention of doing so. As the Conference Report on OPA 90 makes clear, preexisting law remains unaltered to the extent it was not explicitly modified by OPA 90. It states that:

> "Section 1002 of the Conference substitute establishes *liability* notwithstanding any other provisions or rule of law, including the Act of March 3, 1851(46 U.S.C. § 183) [the Limitation Act]. *Therefore, there is no change in current law unless there is specific provision to the contrary.*"
>
> "It is not the intent of the conferees to change the jurisdiction in incidents that are within the Admiralty and Maritime laws of the United States. *The Conferees wish to promote uniformity regarding these laws.*[31]

This portion of the Conference Report was preserved in OPA 90's savings clause, *codified* at 22 U.S.C. § 2751 which states in pertinent part:

> "(b) **Continuation of regulations**
>
> An order, rule or regulation in effect, under a law replaced by this chapter continues in effect under the corresponding provision of this chapter until repealed, amended or superceded . . .
>
> "(e) **Admiralty and maritime claims**
>
> Except as otherwise provided . . . this chapter does not affect admiralty or maritime law."

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§ 2718(c)(2) which repealed the Limitation Act with respect to the United States or any state or political subdivision thereof from imposing fines or penalties (whether criminal or civil) for violation of any law. See the Oil Pollution Act of 1990's Effect on The Shipowner's Limitation of Liability Act, *supra* at 313.

31 H. R. Ret. 101-653, at 159 (1990) [emphasis added].

As these passages make clear, it is only a responsible party's liability and the limits of a responsible party's liability that are modified by OPA 90, not the limitation procedure, and thus it is only OPA 90's limits on liability that are "established notwithstanding any other provision or rule of law."[32] In short, the legislative history of OPA 90 and OPA 90 itself are devoid of any comments suggesting that OPA 90 was intended to repeal or modify the limitation procedures set forth in Rule F. And since OPA 90 explicitly states that it leaves unaffected traditional admiralty and maritime law, unless such changes are specifically provided for in the statute the only conclusion that can be drawn is that Congress had no such intention.

Furthermore, as noted above, OPA 90 expressly states that except where otherwise provided, OPA 90 does not effect existing admiralty and maritime law.[33] OPA 90, in fact, does not otherwise provide, and neither OPA 90, nor its legislative history, address the issue of limitation procedure. Thus, there can be no other conclusion but that the concursus procedure of Rule F remains applicable to OPA 90 claims, thus creating a workable, and indeed logical, scheme to administer the limitation fund created by Congress with the passage of OPA 90.

CONCLUSION

For the above reasons, the Court should grant Certiorari to the Petitioners because:

1. The enactment of OPA 90 did not repeal Rule F of the Federal Rules of Civil Procedure, there was no mention of supplemental Rule F whatsoever in OPA 90 and specifically no reference to the provision for concursus. Therefore, the Courts below erred when they ruled that Rule F was implicitly repealed by the OPA 90 statute; and

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[32] 33 U.S.C. § 2702(a).

[33] 33 U.S.C. § 2751(e)(1).

2. The enactment of the OPA 90 did not repeal the Limitation Act, it only modified the limitation with regard to the liability limits and third parties.

Respectfully Submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-1321

IN THE MATTER OF: THE COMPLAINT
OF METLIFE CAPITAL CORP., ETC.,

Plaintiff-Appellant,

COMMONWEALTH OF PUERTO RICO, ET AL.,

Plaintiffs-Appellees,

v.

M/V EMILY S., ETC., ET AL.,

Defendants-Appellees.

No. 97-1322

IN THE MATTER OF: BUNKER GROUP, INC., ET AL.,

Plaintiffs-Appellants,

COMMONWEALTH OF PUERTO RICO, ET AL.,

Plaintiffs-Appellees,

v.

M/V EMILY S., ETC., ET AL.,

Defendants-Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO
[HON. CARMEN CONSUELO CEREZO, *U.S. DISTRICT JUDGE*]

Before:

Torruella, *Chief Judge*,
Lynch, *Circuit Judge*,
and Keeton,[*] *District Judge*.

Michael Mirandē, with whom *Robert F. Bakemeier*, *Bogle & Gates P.L.L.C.*, *José E. Alfaro-Delgado* and *Calvesbert, Alfaro & López-Conway* were on brief for appellant Metlife Capital Corporation.

John M. Woods, with whom *Andrew J. Garger*, *Thacher Proffitt & Wood*, *William A. Graffam*, *Patricia A. Garrity* and *Jiménez Graffam & Lausell* were on brief for appellant Bunker Group, Inc.

Mee Lon Lam, Trial Attorney, Torts Branch, Civil Division, U.S. Department of Justice, with whom *Frank W. Hunger*, Assistant Attorney General, Civil Division, and *Guillermo Gil*, United States Attorney, were on brief for appellee United States of America.

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* Of the District of Massachusetts, sitting by designation.

Antonio J. Rodríguez, with whom *Rice Fowler*, *José A. Fuentes-Agostini*, Attorney General, Commonwealth of Puerto Rico, *John F. Nevares* and *Smith & Nevares* were on brief for appellee Commonwealth of Puerto Rico.

December 24, 1997

TORRUELLA, *Chief Judge*. These two actions, consolidated for appeal, challenge the district court's ruling that the Oil Pollution Act of 1990 ("OPA"), 33 U.S.C. §§ 2701-61, repealed the Limitation of Shipowner's Liability Act of 1851 ("Limitation Act"), 46 U.S.C. app. §§ 181-96, as to oil spill claims for removal costs and damages arising under the OPA. We hold that claims arising under the OPA (for pollution removal costs and damages) are not subject to the substantive or procedural law of the Limitation Act or to the concursus of claims under Rule F of the Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure ("Rule F").

I. BACKGROUND

On January 7, 1994, the towing wire between the tug M/V EMILY S and the barge MORRIS J. BERMAN parted, grounding the barge off of Punta Escambrón, San Juan, Puerto Rico. The grounding caused much of the MORRIS J. BERMAN's cargo of fuel oil to spill into the waters of the Commonwealth of Puerto Rico (the "Commonwealth"). Soon after the spill, the Commonwealth filed a damages action in the United States District Court for the District of Puerto Rico naming numerous defendants including: (i) the demise charterer of the EMILY S Bunker Group, Inc. ("BGI");

(ii) the operator of the EMILY S Bunker Group Puerto Rico, Inc. ("BGPR"); (iii) the owner and operator of the MORRIS J. BERMAN and the co-demise charterer of the EMILY S New England Marine Services ("NEMS"); (iv) the owner of the EMILY S MetLife Capital Corporation ("MetLife"); and (v) the EMILY S *in rem*. The Commonwealth arrested the EMILY S and sought damages under the OPA, general federal maritime law, and Puerto Rico law. Subsequently, several other civil actions were filed in the District of Puerto Rico by private parties seeking recovery under a variety of theories for damages. Each of these actions was either consolidated with the Commonwealth's action or dismissed.

Within six months of the oil spill, the appellants NEMS, BGI, and BGPR (collectively, the "Bunker Group") filed a complaint under the Limitation Act and Rule F, seeking exoneration from or limitation of liability. At the same time, the appellant MetLife, as owner of the EMILY S, filed a separate action under the Limitation Act. On August 25, 1994, the district court issued a notice to claimants of the limitation actions and an order of injunction, or monition, enjoining the commencement of any actions against the limitation plaintiffs for claims arising out of the grounding of the barge except for actions filed in the limitation proceeding. The monition created a concursus of all claims in a single consolidated proceeding. NEMS, BGI, BGPR, and MetLife (the "Limitation Plaintiffs") provided notice to actual claimants as well as to potential claimants in a Notice of Monition in the newspaper *El Nuevo Día* on August 26, 1994, directing them to file their claims on or before October 15, 1994.

At the conclusion of the monition period, the Limitation Plaintiffs filed motions for entry of default against all persons who failed to file. Subsequently, numerous claimants, including the Commonwealth and the United States (the "Government"), filed actions in the limitation proceedings, seeking recovery of damages under the OPA, general maritime law, and other law. In their claims, both the Commonwealth and the Government asserted that their OPA claims should not be subject to concursus.

Three other claimants, Hilton International of Puerto Rico, Inc., Puerto Rico Tourism Company, and Hotel Development Corporation (collectively, the "Hilton claimants"), filed claims under seal in the limitation proceedings while their administrative claims, which had already been filed with the National Pollution Funds Center ("NPFC"), were pending. The Hilton claimants simultaneously moved the district court for relief in order to preserve their OPA claims if they withdrew them from the concursus. On June 28, 1996, the district court issued an order suspending the August 25, 1994 order of injunction issued in the limitation proceedings. This order allows "any claims for oil spill removal costs or damages resulting from or in any way connected with the grounding of the barge MORRIS J. BERMAN on January 7, 1994 to be asserted independently of the limitation of liability proceedings." Subsequent to the issuance of the order, the Hilton claimants withdrew their limitation claims in order to proceed with their administrative claims before the NPFC. However, their motions served as the vehicle for all parties to brief the question now presented to this court. On August 7, 1996, the appellants NEMS, BGI, BGPR, and MetLife timely filed this appeal of the June 28, 1996 order.

II. DISCUSSION

Interpretations of federal statutes and rules are subject to *de novo* review. *See Strickland* v. *Commissioner, Me. Dept. of Human Servs.*, 96 F.3d 542, 545 (1st Cir. 1996).

A. The Limitation Act and the OPA

The Limitation Act was enacted in 1851 to promote shipbuilding and to induce investment in the growing American shipping industry. *See Hartford Accident & Indem. Co.* v. *Southern Pac. Co.*, 273 U.S. 207 (1927). The law permits the shipowner to limit his or her liability as to certain claims for damages arising out of the voyage of his or her vessel to the

post-accident value of the vessel plus pending freight. *See* 46 U.S.C. §§ 183, 186.

Rule F governs the filing and adjudication of a limitation action. The vessel owner must file a complaint no later than six months after receipt of a claim as well as depositing the amount of the limitation fund with the court. *See* Rule F(1). Rule F concursus, once referred to as the "heart" of a limitation action, *Maryland Cas. Co.* v. *Cushing*, 347 U.S. 409, 417 (1954), requires multiple claimants to pursue relief in a single forum and marshals the assets of a limited fund. *See* Rule F(3), F(7). Concursus is intended to provide a "prompt and economical disposition to controversies." *Cushing*, 347 U.S. at 415. Today, many question the continued usefulness and vitality of the Limitation Act. *See, e.g.*, 2 Thomas J. Schoenbaum, *Admiralty and Maritime Law* (2d ed. 1994) (the Limitation Act's "original purpose . . . seems to have lost much of its force with the availability of insurance, bills of lading statutes that put substantial limits on liability for cargo loss, and the ability to limit claims by contract"). However, Congress has never repealed the act, and therefore, courts continue to apply it. *See, e.g., Keller* v. *Jennette*, 940 F. Supp. 35 (D. Mass. 1996).

The Oil Pollution Act was passed in the wake of the 1989 Exxon Valdez tanker disaster and created a more comprehensive compensation and liability scheme for oil spill pollution than had existed under earlier legislation. Prior to the OPA, the Federal Water Pollution Control Act ("FWPCA") (commonly known as the Clean Water Act), 33 U.S.C. §§ 1251-1387, provided liability limitations for federal pollution removal costs associated with oil spills. *See id.* § 1321(c). The OPA imposes strict liability for pollution removal costs and damages on the "responsible party" for a vessel or a facility from which oil is discharged. *See* 33 U.S.C. § 2702(a). Responsible parties include owners, operators, or demise charterers of a vessel. *See id.* § 2701(32).

The OPA limits the liability of responsible parties based upon the type of vessel and its tonnage. For tank vessels, the

limit can be as high as $10 million. *Id.* § 2704(a)(1). For all other vessels, the limit is the greater of $600 per gross ton or $500,000. *Id.* § 2704(a)(2). Responsible parties may face unlimited liability for, *inter alia*, acts of gross negligence or willful misconduct. In addition, state law applies free of these liability limits. *See id.* §§ 2718(a), 2718(b). Finally, the OPA consolidated previously established oil pollution funds into the Oil Spill Liability Trust Fund (the "Fund"), which pays claims brought under the OPA after they have first been presented to the responsible party, if the responsible party is entitled to a defense, or the liability limit under the statute has been reached. *See* 33 U.S.C. §§ 2708(a), 2713(b)(1)(B). *See generally* Schoenbaum, *supra*, at 384.

B. The OPA's Impact on the Limitation Act

The OPA specifically addresses its relationship with the Limitation Act and other legislation when it states:

> *Notwithstanding any other provision or rule of law*, and subject to the provisions of this chapter, each responsible party for a vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, . . . is liable for the removal costs and damages specified in subsection (b) that result from such incident.

33 U.S.C. § 2702(a) (emphasis added). Appellant MetLife asserts that this provision imposes the OPA's increased liability limits notwithstanding any previously applicable *limitations* under the Limitation Act, but does not eviscerate preexisting limitation *procedure* under the Limitation Act. Thus, the appellant argues, Limitation Act concursus remains available to responsible parties.

However, a plain reading of the subsection suggests that the OPA repealed the Limitation Act with respect to removal cost and damages claims against responsible parties. *See In re JAHRE SPRAY II K/S*, 1996 WL 451315, *4 (D.N.J. 1996);

accord In re Odin Marine Corp., No. 96-5438, slip op. at 6 (S.D.N.Y. Aug. 7, 1997); *Tug Capt. Fred Bouchard Corp.* v. *M/V BALSA 37*, No. 93-1321, slip op. at 2 (M.D. Fla. Oct. 22, 1996). Accordingly, the procedural rules incorporated into the Limitation Act are inapplicable as well to such claims. In interpreting similar language in the FWPCA, courts have held that the statute's "notwithstanding" phrase precludes application of the Limitation Act to claims by the United States for FWPCA pollution removal costs. *See In re Oswego Barge Corp.*, 664 F.2d 327, 340 (2d Cir. 1981); *In re Hokkaido Fisheries Co., Ltd.*, 506 F. Supp. 631, 643 (D. Alaska 1981). *See also Schoenbaum, supra*, at 376 ("OPA broadly supersedes the Limitation of Liability Act with respect to damages and removal costs under both federal and state law, including common law"). We find these cases to be persuasive because "[n]either the language of OPA nor its legislative history suggests that OPA's provisions should be construed contrary to the settled law applicable to FWPCA when OPA was enacted." William M. Duncan, The Oil Pollution Act of 1990's Effect on the Shipowner's Limitation of Liability Act, 5 U.S.F. L. Rev. 303, 316 (1993).

In addition to the "notwithstanding" clause, at least four other provisions in the statute explicitly repeal the Limitation Act with respect to certain types of claims. *See* 33 U.S.C. §§ 2702(d)(1)(A) (repealing the Limitation Act as to third parties solely responsible for a spill); 2718(a) (repealing the Limitation Act as to state and local statutory remedies); 2718(c)(1) (repealing the Limitation Act as to additional liability imposed by the United States, any state, or political subdivision); 2718(c)(2) (repealing the Limitation Act as to fines or penalties). The appellants contend that, outside of these specific instances, the Limitation Act continues to apply to the OPA. The Bunker Group, citing one commentator, notes that "[i]f Congress' intent in enacting OPA had been to completely repeal the Limitation Act, it would not have painstakingly repealed it only with respect to certain types of actions." Duncan, *supra*, at 319.

When we consider these five OPA provisions which explicitly repeal the Limitation Act as well as others that are irreconcilably in conflict, *see infra*, we find that the OPA has repealed the Limitation Act as to oil spill pollution claims arising under the OPA in the instant case. " '[W]here provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one . . . .' " *See Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 154 (1976) (quoting *Posadas* v. *National City Bank*, 296 U.S. 497, 503 (1936) (noting standard for repeal by implication)).

While the repeal of statutes by implication is disfavored, *see Tennessee Valley Auth.* v. *Hill*, 437 U.S. 153, 189 (1978), several key provisions of the two statutes are plainly inconsistent. First, the Limitation Act limits the shipowner's liability to the post-accident value of the vessel plus pending freight, 46 U.S.C. § 183, while the OPA contemplates a strict liability regime with statutory limits of at least $2 million for tanks vessels and $.5 million for all other vessels. 33 U.S.C. §§ 2702, 2704. Moreover, in certain instances, the OPA imposes virtually unlimited liability on the responsible party. *See* 33 U.S.C. §§ 2704(c). Second, the provisions on jurisdiction are in obvious tension. Only federal courts have jurisdiction over limitation proceedings. *See, e.g., Complaint of Dammers & Vanderheide & Scheepvaart Maats Christina B.V.*, 836 F.2d 750, 755 (2d Cir. 1988). In contrast, the OPA grants federal *and state*courts jurisdiction to decide oil pollution cases. 33 U.S.C. §§ 2717(b), 2717(c). Finally, the provisions of Rule F, the procedural rule that implements and which is incorporated into the Limitation Act, cannot be reconciled with sections of the OPA. *See* Part C, *infra*.

Even assuming *arguendo* that the language is ambiguous, the legislative history is consistent with our interpretation. As this court has noted, the "chief objective of statutory interpretation is to give effect to legislative will." *Passamaquoddy Tribe* v. *State of Me.*, 75 F.3d 784 (1st Cir. 1996). In considering the OPA's liability provision, Congress stated:

> Liability under this Act is established notwithstanding any other provision or rule of the law. This means that the liability provisions of this Act would govern limitations compensation for removal costs and damages notwithstanding any limitations under existing statutes such as the act of March 3, 1851 . . . .

H.R. Conf. Rep. No. 101-653, at 103 (1990), *reprinted in* 1990 U.S.C.C.A.N. 779, 781 (Joint Explanatory Statement of the Conference Committee explaining § 2702(a)). Furthermore, the Senate Report on the OPA bill asserts that the OPA "completely supersedes the 1851 statute with respect to oil pollution." S. Rep. No. 101-94, at 14, *reprinted in* 1990 U.S.C.C.A.N. 722, 736.

More generally, as the Ninth Circuit reasoned in finding an implicit repeal of the Limitation Act by the liability provisions of the Trans-Alaska Pipeline Authorization Act, 43 U.S.C. §§ 1651-1655, "[a]pplication of the Limitation Act to [the OPA] would frustrate completely [the OPA]'s comprehensive remedial nature." *See In re Glacier Bay*, 944 F.2d 577, 583 (9th Cir. 1991). "The purpose of OPA, as well as other remedial legislation passed by Congress and the states to address environmental disasters such as oil spills, was to encourage rapid private party responses." *JAHRE SPRAY*, 1996 WL 451315, at *4. However, the Limitation Act "allows vessel owners virtually to eliminate liability for catastrophic damages." *Glacier Bay*, 944 F.2d at 583. Hence, the OPA's scheme is in irreconcilable conflict with the Limitation Act.

Some claims arising from an incident in which oil pollution occurs do not escape the Limitation Act. For example, that Act remains in force for general maritime claims such as maritime tort actions for harms to persons or vessels. *See* 33 U.S.C. § 2751(e) ("[e]xcept as otherwise provided in this chapter, this chapter does not affect . . . admiralty and maritime law"). The district court below, in keeping with the OPA's savings provision in § 2751(e), reserved the Limitation Plaintiffs' right "to seek limitation of liability for those

claims subject to reduction under the Limitation Act." Therefore, the Bunker Group's contention that the district court's order exempts from Rule F concursus all claims arising from the grounding, whether or not they arise under the OPA, is without merit. The appellants remain free to avail themselves of the Limitation Act and Rule F concursus for their non-OPA claims.

C. The Independent Application of Rule F Concursus

The appellants claim that even if the OPA supersedes the Limitation Act, because the OPA fails to provide any guidance on the procedure necessary to implement it, Rule F concursus applies to actions under the OPA independently of the Limitation Act. To support their contention, the appellants note that Rule F is framed generally to address "limitation of liability pursuant to *statute*." Rule F(1). Rule F was originally written by the Supreme Court to implement the 1851 Limitation Act. In redrafting the rules, the Supreme Court substituted a direct reference to the 1851 statute in Rule F with the "pursuant to statute" language, which we find reveals a more general purpose for Rule F.

We conclude, however, that Rule F's requirements on venue and limitation of liability cannot be reconciled with the OPA's provisions regarding oil spill damages. Under Rule F, a limitation of liability proceeding may be commenced only in the district where the vessel has been seized, or if the vessel has not been seized, in any district in which the owner has been sued. *See* Rule F(9). If neither the vessel has been seized nor action commenced against the owner, the limitation action may be filed in the district where the vessel may be. *See id.* Venue is proper in any district only if there is no pending litigation and the vessel is not within any district. *See id.* Under the OPA, in contrast, venue is proper in any district in which the discharge of oil or injury or damages occurred, or in which the defendant resides, may be found, has its principal office, or has appointed an agent for service of process. 33 U.S.C. § 2717(b). Thus, the OPA offers claimants a much

broader choice of forums while Rule F's venue requirements are significantly more restrictive.

Rule F's deadline for claims is also inconsistent with the OPA's statute of limitation. Once a limitation action is commenced, the court issues a notice to claimants requiring them to file their claims by the date fixed in the notice. *See* Rule F(4). The court may fix a date that requires claims to be filed in as little as 30 days after issuance of the notice. *Id.* In the instant case, the monition period terminated approximately ten months after the date of the MORRIS J. BERMAN's grounding. The OPA, however, allows claimants three years to commence an action to recover removal costs and damages. *See* 33 U.S.C. §§ 2717(f)(1), 2717(f)(2). In addition, if the claimant decides to seek recovery from the Fund, the claimant has six years to present removal costs claims, *see* 33 U.S.C. § 2712(h)(1), and three years to present damage claims. *See id.* § 2712(h)(2). Finally, section 2717(f)(4) extends the limitation period for subrogation actions by three years from the date the Fund pays a subrogated claim. *See* 33 U.S.C. § 2717(f)(4).

One concern we have with the shortened claims period under Rule F is that it would interfere with the United States' subrogation rights under the OPA. If oil spill claims are subject to Rule F concursus, claimants who are barred by the court imposed deadline from recovering against the responsible party, are likely to present their claims to the Fund. Once the Fund pays a claim, the United States acquires all rights of subrogation. *See* 33 U.S.C. §§ 2712(f), 2713, 2715(a). However, at that point, the United States may then be denied access to the proceedings against the responsible party, and consequently, the Fund will bear the financial burden of these late claims.

The appellants respond that, under Rule F, the government's subrogation rights do not necessarily lapse because "[f]or cause shown, the court may enlarge the time within which claims may be filed." Rule F(4). We believe though that subjecting the government's subrogation rights to the dis-

cretion of the trial court in every oil spill action fails to adequately secure those rights. Congress specifically examined this issue in creating the OPA's statute of limitation and giving the courts discretion over this matter is contrary to legislative intent. Moreover, even if the courts consistently enlarge the monition period for subrogation claims, in many instances, the limited fund established by the concursus procedure will already have been exhausted.

Finally, contrary to the appellants' contention that the OPA fails to provide *any* procedural guidance, the OPA does establish a claims procedure. The OPA requires all claims for removal costs or damages to be presented first to the responsible party or guarantor. *See* 33 U.S.C. § 2713(a). If the responsible party denies liability or the claim is not settled within 90 days, the claimant may proceed against the responsible party in court or present the claim to the Fund. *See id.* § 2713(c). In some enumerated instances, claims may be presented directly to the Fund without first presenting them to the responsible party. *See id.* § 2713(b). "The purpose of the claim presentation procedure is to promote settlement and avoid litigation." *Johnson* v. *Colonial Pipeline Co.*, 830 F. Supp. 309, 310 (E.D. Va. 1993). In contrast to the OPA's claims procedure, Rule F forces all claimants into litigation against the vessel owner. If a claimant fails to appear in the limitation action within the monition period, he or she is enjoined from raising any claims. *See* Rule F(3). In view of these inconsistencies, we conclude that Rule F concursus even if independent of the Limitation Act is inapplicable to OPA claims.

III. CONCLUSION

For the reasons stated in this opinion, the district court's order is *affirmed*.

Costs to be assessed against appellants.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil 94-1019CCC

THE COMMONWEALTH OF PUERTO RICO ON ITS OWN BEHALF, AND AS PUBLIC TRUSTEE AND AS *PARENS PATRIAE* FOR THE CITIZENS OF THE COMMONWEALTH, THE ENVIRONMENTAL QUALITY BOARD OF THE COMMONWEALTH OF PUERTO RICO AND THE DEPARTMENT OF NATURAL RESOURCES OF THE COMMONWEALTH OF PUERTO RICO,

Plaintiffs

vs

THE M/V EMILY S AND THE BARGE MORRIS J. BERMAN, *IN REM*; METLIFE CAPITAL CORPORATION, PETER FRANK, BUNKER GROUP, INC.; PARK LANE ASSOCIATES, PEDRO RIVERA, NEW ENGLAND MARINE SERVICES, INC., ABC INSURANCE COMPANY AND DEF INSURANCE COMPANY *in personam*,

Defendants

YAACOV EISAK

Intervening Plaintiff

RAUL HORTA-GONZALEZ, DIEGA CASTILLO-HERNANDEZ, ADOLFO ARNAU-SANCHEZ, ROSA ALDAY-DE-ARNAU,

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Plaintiffs representative of proposed class

CIVIL 94-1047CCC

CAFE ST. ELMO, INC., HAVANA SAN JUAN CORP., OASIS RESTAURANT, INC., EDDIE MEJIAS d/b/a SOUVENIR SHOP,

Individual Plaintiffs

VS

THE TUG EMILY S, and the Barge MORRIS J. BERMAN,

Defendants *in rem*

A. CLYDE PRUITT; EMILY S. PRUITT, PETER FRANK; JOHN DOE and/or RICHARD DOE; NEW ENGLAND MARINE SERVICES, INC; EVELYN BERMAN FRANK, SUSAN FRANK; JIM DOE and/or SAM DOE; STANDARD TANK CO.; PETER DOE; BUNKERS GROUP OF PUERTO RICO; CARIBBEAN PETROLEUM CORPORATION; JIMMY DOE;

INSURANCE COMPANIES and/or P & I CLUBS "A" THROUGH "J",

Defendants *in personam*

CIVIL 94—1058CCC

ESCAMBRON BEACH CLUB, INC.,

Plaintiff

vs.

M/V EMILY S., BARGE MORRIS J. BERMAN, *IN REM*; NEW ENGLAND MARINE SERVICES, INC., A. CLYDE PRUITT; EMILY S. PRUITT, DOE COMPANY, RICHARD ROE,

Defendants

CIVIL 94-1919CCC

IN THE MATTER OF THE COMPLAINT OF METLIFE CAPITAL CORPORATION, as owner of the Tub "EMILY S," for Exoneration from or Limitation of Liability

---

ORDER

Having considered the Petition for Dismissal or Stay of Proceedings filed by the Puerto Rico Tourism Company (Tourism Company) and the Hotel Development Corporation (HDC) **(docket entry 152)**, the Joint Motion to Amend Order and Notice; to Stay Proceedings; or in the Alternative, to

Relax the Monition Period filed by Hilton International of Puerto Rico, Inc. (Hilton) and HDC **(docket entry 153)**, the Memorandum in Opposition filed by Metlife Capital Corporation **(docket entry 193)**, the Memorandum in Opposition filed by Bunker Group, Inc. (BGI), New England Marine Services, Inc. (NEMS) and Bunker Group Puerto Rico, Inc. (BGPR) **(docket entry 195)**, the memoranda filed by both the United States of America **(docket entry 230)** and the Commonwealth of Puerto Rico **(docket entry 232)** regarding the issue of whether claims for removal costs and damages of the kinds specified in the Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484 (1990), 33 U.S.C. § 2701 *et. seq.* (hereinafter "oil pollution removal costs and damages") caused by, resulting from or in any way connected with the grounding of the barge MORRIS J. BERMAN on January 7, 1994 may be subjected to the substantive or procedural laws of the Shipowner's Limitation of Liability Act of March 3, 1851 (the Limitation Act), 46 U.S.C. § 183 *et. seq.*, Rule F(3) of the Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure, or this Court's Order of Injunction Restraining Prosecution of Claims Pursuant to Rule F(3) of the Federal Rules of Civil Procedure entered on August 25, 1994 (Order of Injunction), as well as the Reply by the Bunker Group Limitation Plaintiffs to the Motions Filed by the Commonwealth of Puerto Rico and the United States filed by BGI, NEMS and BGPR **(docket entry 285)**, Hilton and HDC's Surreply to Bunker Group's Reply **(docket entry 298)** and Puerto Rico Tourism Company's Motion Joining in Favor of Hilton and HDC's Surreply to Bunker Group's Reply **(docket entry 299)**,

IT IS HEREBY ORDERED that the August 25, 1994 Order of Injunction is hereby suspended to the extent that it stays any claims for oil spill removal costs or damages resulting from or in any way connected with the grounding of the barge MORRIS J. BERMAN on January 7, 1994,

IT IS FURTHER ORDERED that the NOTICE TO CLAIMANTS OR COMPLAINTS FOR EXONERATION FROM OR LIMITATION OF LIABILITY AND ORDER OF MONITION entered by the Court on August 25, 1994 is hereby modified to allow any claims for oil spill removal costs or damages resulting from or in any way connected with the grounding of the barge MORRIS J. BERMAN on January 7, 1994 to be asserted **independently** of the limitation of liability proceedings consolidated with Civil No. 94-1019CCC, in accordance with applicable law. The limitation plaintiffs will retain the right to seek limitation of liability for those claims subject to reduction under the Limitation Act.

Given the Court's disposition as outlined above, both the Petition for Dismissal or Stay ofl Proceedings filed by the Tourism Company and (HDC) (**docket entry 152**) and the Joint Motion to Amend Order and Notice; to Stay Proceedings; or in the Alternative, to Relax the Monition Period filed by (Hilton) and HDC (**docket entry 153**) are hereby DENIED AS MOOT.

SO ORDERED.

At San Juan, Puerto Rico, on June 28, 1996.

CARMEN CONSUELO CEREZO
Chief, U.S. District Judge

No. 97-1610

Supreme Court, U.S.
FILED
APR 29 1998
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1997

IN THE MATTER OF BUNKER GROUP INC.,
BUNKER GROUP PUERTO RICO, INC.,
NEW ENGLAND MARINE SERVICES, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA, *et al.*,
COMMONWEALTH OF PUERTO RICO, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS COMMONWEALTH OF PUERTO RICO, *et al.*

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PARTIES TO THE PROCEEDING

The petition also should have included the Commonwealth of Puerto Rico as a party. The Commonwealth of Puerto Rico appears on its own behalf, and as Public Trustee and as *parens patriae* for the Citizens of the Commonwealth, the Board on Environmental Quality of the Commonwealth of Puerto Rico, the Department of Natural Resources of the Commonwealth of Puerto Rico and the Puerto Rico Tourism Company.

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REASONS FOR DENYING THE WRIT

I.

CERTIORARI SHOULD NOT BE GRANTED BECAUSE NEITHER THE COURT OF APPEALS NOR THE DISTRICT COURT HAS "SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS" AS TO WARRANT A GRANT OF CERTIORARI.

Petitioners Bunker Group Inc., Bunker Group Puerto Rico, Inc., and New England Marine Services, Inc. (collectively "Bunker Group") urge this Court to grant a writ of certiorari under Supreme Court Rule 10(a) (Rule 10(a)) because

> a United States court of appeals has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this court's supervisory power.

Pet. for Writ of Cert. at 3 (Pet. 3). Rule 10(a) does not provide suitable grounds for granting certiorari in this case. The courts have not misused the rules of procedure and practice, and there is no reason for this Court to exercise its supervisory powers. Historically, this Court has been reluctant to intervene in all but the most egregious violations where a court clearly exceeds the scope of its authority. *See generally* 23 James W. Moore, *et al.*, Moore's Fed. Practice, § 510.24 (3d ed. 1998). Bunker Group's petition fails to establish sufficient grounds for granting certiorari.

A. Bunker Group has failed to explain why a writ of certiorari should be granted.

Bunker Group focuses solely on the merits of its argument and never attempts to show any departure from the accepted

and usual course of judicial proceedings requiring this Court's supervision. Because Bunker Group has completely failed to show why this is one of the few cases which this Court should consider, the Court should summarily deny certiorari without considering the merits of Bunker Group's argument. Simply stated, Bunker Group does not allege any violation of major concern to the integrity of the federal judicial process. Thus, Supreme Court review is not warranted.

Years ago, Justice Frankfurter warned petitioners against arguing their case on the merits and failing to explain why certiorari was proper.

> The major recurrent vice of petitions . . . is the failure to perceive the elementary distinction between an extended argument on the merits (obviously inappropriate until the merits are before the Court) and an argument on the issue whether certiorari should or should not be granted. Only in exceptional cases is any but cursory discussion of the merits appropriate in the petition at all. . . .

Felix Frankfurter and Henry M. Hart, Jr., *The Business of the Supreme Court at October Term, 1933*, 48 Harv. L. Rev. 238, 265 (1934). Justice Frankfurter explained that the brief must be "confined to argument upon the reasons relied on for allowance of the writ." *Id.* at 266.

B. Bunker Group cannot show that the courts below departed from the accepted and usual course of judicial proceedings in this case of statutory interpretation.

Bunker Group seeks to invoke the least likely basis for certiorari under the Rule 10 alternatives. The Court seldom invokes its supervisory powers as a basis for granting a writ. Justice Frankfurter's initial guidance on application of former

Rule 35(5)(b), the predecessor of current Rule 10(a),[1] explained the limited basis for granting certiorari under these conditions:

> The ratio of successful to attempted invocations for this reason is smaller than that of any other. To scores of petitions each year, any asserted error in the decision of a case, however minute and of whatever character, is such a departure "from the accepted and usual course of judicial proceedings" as to call for an exercise of the Supreme Court's power of supervision. Of course, the reason refers neither to errors of law nor to minor departures from customary practice. It refers to matters of major concern to the integrity of the federal judicial process. How rarely the Supreme Court regards as necessary any intervention on this ground appears from the fact that no single grant of certiorari last term was attributable to it. . . .

48 Harv. L. Rev. at 274. Certiorari should be denied because Bunker Group has not shown the manner in which the courts below have so far departed from the accepted and usual course of judicial proceedings as to create an issue of major concern to the integrity of the federal judicial process.

Historically, this Court has invoked its supervisory powers reluctantly, reserving them for only the most egregious instances of abuse or ignorance of clear directives. *See*, *e.g.*, *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 344 (1976) (certiorari granted after appellate court improperly remanded a case after removal in order to reduce overburdened federal docket); *Connor v. Coleman*, 440 U.S. 612, 622 (1979) (Marshall, J., dissenting) (three-judge panel ignored Court

1. *See* 23 James W. Moore, *et al.*, Moore's Fed. Practice, § 510 App. 01 (3d ed. 1998) (text of Supreme Court Rule 35(5) of the 1925 Rules).

directive on implementing apportionment plan) *Hickman v. Taylor*, 329 U.S. 495, 514 (1947) (certiorari granted to define the scope of the attorney work product exception to discovery); *Zahn v. International Paper Co.*, 414 U.S. 291, 292 (1973) (certiorari granted to address the application of jurisdictional amounts in controversy under class action suits); *Hanna v. Plumer*, 380 U.S. 460, 463 (1965) (certiorari granted to determine whether federal service of process rules are replaced by state law); *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 570 (1979) (court incorrectly decided a constitutional issue before a statutory issue); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 470 (1982) (certiorari granted to correct a broad and novel view of standing).

Bunker Group has not met its burden of showing the presence of any issues of a magnitude requiring the Court to exercise its supervisory powers over a lower court. Accordingly, certiorari should be denied.

C. No other compelling reasons warrant a grant of certiorari.

The principal purpose for which this Court uses certiorari jurisdiction is to resolve conflicts among circuit courts of appeals and state courts concerning the meaning of provisions of federal law. *Braxton v. United States*, 500 U.S. 344, 348 (1991). No such reason exists in this case. Because the First Circuit is the only court of appeals which has considered the arguments raised by Bunker Group, there is no conflict among the federal circuits. In addition to the Puerto Rico district court, every district court which has considered the issue has reached the same result — that the Limitation of Shipowners Liability Act, 46 U.S.C. §§ 181-89 (Limitation Act) does not apply to claims for oil spill removal costs and damages. *See In re JAHRE SPRAY II*, 1997 A.M.C. 845, 855, 1996 WL 451315, *4 (D.N.J. 1996);

In re Odin Marine Corp., No. 96-5438, slip op. at 6 (S.D.N.Y. Aug. 7, 1997);[2] *Tug Capt. Fred Bouchard Corp. v. M/V BALSA 37*, No. 93-1321-CN-T-23B, slip op. at 2 (M.D. Fla. Oct. 22, 1996)[3]. Further, there are no important federal questions which have been decided by a state court of last resort.

Bunker Group's concerns about the lack of a concursus procedure[4] for oil pollution claims does not present an important question of federal law which has not been, but should be,

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2. This case is on appeal to the Second Circuit.

3. This case is on appeal to the Eleventh Circuit, but as noted in the Memorandum of *Amicus Curiae* filed by Bouchard Transportation Co., Inc., it may be procedurally different from the instant case. Memorandum of *Amicus Curiae* at 2.

4. The "concursus" is a procedural device established by the Limitation Act and Rule F of the Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure (Rule F). It is somewhat like an interpleader procedure, but is unique to vessel owners. Its only purpose is to marshal the vessel owner's assets (the limitation fund) in a single court proceeding for pro rata distribution among multiple claimants. Its purpose is not to marshal the claimants. A concursus is not available if the limitation fund is adequate to pay all claims in full. *Lake Tankers Corp. v. Henn*, 354 U.S. 147, 151-52, *reh'g. denied*, 354 U.S. 945 (1957).

In contrast, Congress intended for full compensation of all allowable claims under the Oil Pollution Act of 1990, 33 U.S.C. §§ 2701-61 (OPA), from either those responsible for the spill or from the National Pollution Funds Center (the Fund). No fund is deposited with any court for distribution. OPA claims not paid by the responsible party may be presented to the Fund for payment. Because no court is required to marshal and distribute a fund, concursus is inapplicable. Also, concursus is never available for responsible parties who are not vessel owners. e.g. owners and operators of facilities such as pipeline and terminals.

settled by this Court. Congress, not the judiciary branch, should address Bunker Group's concerns. In August 1996, Senator Breaux of Louisiana proposed an amendment to the Oil Pollution Act of 1990, 33 U.S.C. §§ 2701-61 (OPA), creating a concursus procedure for an OPA claim. *See* S. 2009, 104th Cong., 1st Sess. § 106 (1996) (proposed OPA amendment to create concursus). The proposal was not enacted.

Bunker Group's issues with OPA do not rise to the high level of importance required for granting certiorari. The importance of a question presented is measured by matters of "genuine, intrinsic public significance," or where the law requires uniformity. *See generally* 42 Harv. L. Rev. at 271-272. *See also* William Howard Taft, *The Jurisdiction of the Supreme Court under the Act of February 13, 1925*, 35 Yale L. J. 1, 2 (1925) ("The function of the Supreme Court is conceived to be, not the remedying of a particular litigant's wrong, but the consideration of cases whose decision involves principles, the application of which are of wide public or governmental interest, and which should be authoritatively declared by the final court."). Bunker Group simply fails to address either a need for uniformity or a question of widespread public concern.

For these reasons, Bunker Group's petition for certiorari should be denied.

II.

APPLYING THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, THE COURTS BELOW CORRECTLY CONCLUDED THAT OPA IMPLICITLY REPEALED THE LIMITATION ACT AS TO CLAIMS FOR OIL SPILL REMOVAL COSTS AND DAMAGES.

In its *de novo* review of OPA, the court of appeals concluded that OPA repealed the Limitation Act as to oil spill pollution claims in

the instant case. *In re MetLife Capital Corp.*, 132 F.3d 818, 822 (1st Cir. 1997); Pet. App. A1-A13, A-9. It found five OPA provisions which explicitly repealed the Limitation Act as to oil spill claims, as well as other provisions which irreconcilably conflicted with the Limitation Act. *Id.* The court recognized that where the provisions of two acts cannot be reconciled, the later act, to the extent of the conflict, constitutes an implied repeal of the earlier one. *Id.* (quoting *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976) (quoting *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936))).

The five OPA provisions recognized by the court of appeals as conflicting with the Limitation Act are codified at 33 U.S.C. § 2702(a) (section's "notwithstanding" clause suggests that OPA repealed the Limitation Act with respect to oil spill removal costs and damages), 33 U.S.C. § 2702(d)(1)(A) (repealing the Limitation Act as to third parties solely responsible for a spill), 33 U.S.C. § 2718(a) (repealing the Limitation Act as to state and local statutory remedies), 33 U.S.C. § 2718(c)(1) (repealing the Limitation Act as to additional liability imposed by the United States, any state, or political subdivision), and 33 U.S.C. § 2718(c)(2) (repealing the Limitation Act as to fines and penalties). *In re MetLife*, 132 F.3d at 821; Pet. App. A-8.

When it evaluated OPA's § 2702(a) requirement that the responsible party is liable for oil spill removal costs and damages "notwithstanding any other provision or rule of law," the court of appeals followed the reasoning used by other courts interpreting similar language in the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (FWPCA). Those courts held that the FWPCA's "notwithstanding" phrase precluded application of the Limitation Act to claims for FWPCA pollution removal costs. *See In re MetLife*, 132 F.3d at 821; Pet. App. A-8, (citing *In re Oswego Barge Corp.*, 664 F.2d 327, 340 (2d Cir. 1981); *In re Hokkaido Fisheries Co., Ltd.*, 506 F. Supp.

631, 634 (D. Alaska 1981))[5]. The court found those cases persuasive because neither OPA's language nor its legislative history suggests that OPA should be construed contrary to the settled law applicable to the FWPCA when OPA was enacted. *Id.*

While the court of appeals recognized that repeal of statutes by implication is disfavored, it found that several key provisions of the two statutes are plainly inconsistent. *Id.* at 822; Pet. App. A-9. Further, the court found OPA's legislative history consistent with its interpretation. *Id.* The court cited a provision expressly demonstrating Congress's intent for OPA to supersede the Limitation Act for oil spill removal costs and damages:

> Liability under this Act is established notwithstanding any other provision or rule of law. This means that the liability provisions of this Act would govern compensation for removal costs and damages notwithstanding any limitations under existing statutes such as the act of March 3, 1851. . . .

In re MetLife, 132 F.3d at 822; Pet. App. A-10, (citing H.R. Conf. Rep. No. 653, 101st Cong., 2d Sess. 101 (1990), *reprinted in* 1990 U.S.C.C.A.N. (101 Stat.) 779, 781 (Joint Explanatory Statement of the Conference Committee explaining § 2702(a))).

While concluding that OPA repealed the Limitation Act as to claims for oil spill removal costs and damages arising under

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5. The court of appeals also cited 2 Thomas J. Schoenbaum, *Admiralty and Maritime Law*, 376 (2d ed. 1994) ("OPA broadly supersedes the Limitation of Liability Act with respect to damages and removal costs under both federal and state law, including common law"). *Id.*

OPA, the court of appeals correctly recognized that some of the claims arising from an incident in which oil pollution occurs may remain within the scope of the Limitation Act. *In re MetLife*, 132 F.3d at 822; Pet. App. A-10. For example, maritime tort actions for injury or damages to persons or vessels remain subject to the Limitation Act. *Id.* The district court correctly reserved the limitation plaintiffs' right to seek limitation of liability for those claims subject to reduction under the Limitation Act. *In re MetLife*, 132 F.3d at 822-23; Pet. App. A-10 through A-11.

Certiorari should not be granted because the court's analysis of these issues simply has not departed from the accepted and usual course of judicial proceedings.

III.

THE COURTS BELOW CORRECTLY HELD THAT RULE F IS INAPPLICABLE TO CLAIMS FOR OIL SPILL REMOVAL COSTS AND DAMAGES.

The court of appeals also considered *de novo* Bunker Group's argument that even if OPA supersedes the Limitation Act, the concursus provisions of Rule F apply to actions under OPA independently from the Limitation Act. *In re MetLife*, 132 F.3d at 823-24; Pet. App. A-11 through A-13. The court concluded that Rule F's venue and limitation of liability requirements cannot be reconciled with OPA. *In re MetLife*, 132 F.3d at 823; Pet. App. A-11 through A-12. Similarly, the court concluded that Rule F's deadline for filing claims is also inconsistent with OPA's statute of limitations. *In re MetLife*, 132 F.3d at 823; Pet. App. A-12. The court noted that contrary to Bunker Group's contentions, OPA establishes a claims procedure. *In re MetLife* 132 F.3d at 824; Pet. App. A-13. (outlining OPA's claim procedure in 33 U.S.C. § 2713 and contrasting it with Rule F). After comparing OPA's requirements

with those of Rule F, the court concluded that the inconsistencies between the two procedures rendered Rule F inapplicable to OPA claims, even if Rule F applies in situations separate from the Limitation Act. *Id.*

Bunker Group has not shown, and cannot show, the manner in which the court's thorough analysis of the applicability of Rule F to OPA claims has departed from the accepted and usual course of judicial proceedings.

CONCLUSION

The petitioners have not shown that either the court of appeals or the district court has "so far departed from the accepted and usual course of judicial proceedings" as to warrant exercise of this Court's supervisory powers. Because they cannot do so, they have presented only their argument on the merits. The courts' interpretation of OPA does not create a conflict among circuit courts of appeals or state courts concerning the meaning of provisions of federal law, or any other basis for granting certiorari. If the petitioners seek to have OPA changed, they should petition Congress for relief. Certiorari should not be granted.

Respectfully submitted,

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(3)

Supreme Court, U.S.
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No. 97-1610

In The

Supreme Court of the United States

October Term, 1997

IN THE MATTER OF BUNKER GROUP, INC.; BUNKER GROUP PUERTO RICO, INC.; and NEW ENGLAND MARINE SERVICES, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

MEMORANDUM OF *AMICUS CURIAE*

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MEMORANDUM OF *AMICUS CURIAE*

Now comes Bouchard Transportation Co., Inc., *amicus curiae*, by its undersigned counsel, and prays that the Court reserve ruling on the petition for writ of certiorari to the United States Court of Appeals for the First Circuit. There is currently pending in the United States Court of Appeals for the Eleventh Circuit three consolidated cases in which the Eleventh Circuit is considering the issue raised in the petition. The analysis of the Eleventh Circuit may be of assistance to the Court.[1]

STATEMENT OF THE CASE

The *amicus curiae* adopts the Statement of the Case as set forth in the petition.

INTEREST OF THE *AMICUS CURIAE*

On August 10, 1993, two tug-barge units and a freighter were involved in a collision on Tampa Bay, resulting in the discharge of petroleum products into Florida's navigable waters. The *amicus curiae* was the operator of one of the tug-barge units. *See Bouchard*

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[1] The parties have consented to the filing of this memorandum.

Counsel for a party did not author this brief in whole or in part. A monetary contribution to the preparation and submission of this memorandum will be made by the indemnity insurer of the *amicus curiae*, The West of England Ship Owners Mutual Insurance Association (Luxembourg).

Transp. v. Florida Dept. of Envir. Prot., 91 F.3d 1445 (11th Cir. 1996), and *Boca Ciega Hotel, Inc. v. Bouchard Transportation Company, Inc.*, 51 F.3d 235 (11th Cir. 1995).[2]

Arising out of the Tampa Bay accident, there are currently pending in the Eleventh Circuit three cases[3] in which the primary issue is essentially the same issue raised in the petition for writ of certiorari to the First Circuit, heretofore the only circuit court to consider the issue. Oral argument was received by the Eleventh Circuit on January 15, 1998, and the consolidated cases remain under submission.

Petitioners did not mention the Eleventh Circuit cases in their petition, and the *amicus curiae* wishes to bring the Eleventh Circuit cases to the attention of the Court.

In this memorandum, the *amicus curiae* urges the Court to reserve ruling on the petition for writ of certiorari until after the Eleventh Circuit renders its decision and opinion. It will be shown below that there is a significant procedural difference between the Eleventh Circuit cases and the case at bar. The Eleventh Circuit is expected to consider this procedural difference, and its analysis may be of assistance to the Court.

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[2] In the opinions in these two cases, there are some factual and procedural inaccuracies not important here.

[3] *Complaint of Bouchard Transportation Co., Inc., etc. v. The United States, et al.*, case number 96-3494, consolidated with *Complaint of Maritrans Operating Partners, etc. v. The United States*, case number 96-3727, and *Complaint of Tsacaba Shipping Co., Inc. etc. v. The United States*, case number 96-3605.

MEMORANDUM

Following the accident on Tampa Bay on August 10, 1993, described above, the owners and operators of the two tug-barge units and of the freighter commenced limitation proceedings in the United States District Court for the Middle District of Florida under Rule F, Supplemental Rules for Certain Admiralty and Maritime Claims ("Supplemental Rule F").

The owners and operators of the two tug-barge units were accused of discharging petroleum products and were designated "responsible parties" by the Coast Guard under § 2701(32)(A) of the Oil Pollution Act of 1990 ("OPA 90"), 33 U.S.C.A. §§ 2701-61 (West Supp. 1998).[4]

These "responsible parties" used the procedure of Supplemental Rule F to seek limitation of liability under OPA 90 § 2704 as to claims defined in OPA 90 and under the Limitation of Shipowner's Liability Act of 1851 ("Limitation Act"), 46 U.S.C. §§ 181-189, as to claims brought under the general maritime law and under Florida law.[5] The owner of the freighter, which had not been designated a "responsible party" under OPA 90, sought limitation only under the Limitation Act.[6]

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[4] All references to OPA 90 are to 33 U.S.C.A. (West Supp. 1998).

[5] The "responsible parties" also sought limitation as may be allowed under any other federal or state limitation statute.

[6] "Responsible party" is a term used in OPA 90 to designate the owner, operator, or demise charterer of a vessel from which oil is spilled. OPA 90 § 2701(32)(A). "Responsible party" does not necessarily equate to "at fault party" because a "responsible party" may assert absolute defenses to liability. OPA 90 § 2703.

In the limitation cases commenced by the "responsible parties," injunctions were entered under Supplemental Rule F(3) that were tailored to accommodate the claims presentation procedure of OPA 90 § 2713(a), which requires claimants in the first instance to present their claims directly to "responsible parties" before commencing litigation. *See Boca Ciega Hotel, Inc. v. Bouchard Transp. Co., Inc.*, 51 F.3d 235 (11th Cir. 1995) (enforcing the claims presentation procedure as a condition precedent to commencing suit). The injunctions read in relevant part as follows:

> ORDERED, that the notice provision of subsection (4) of Rule F of the Supplemental Rules for Certain Admiralty and Maritime Claims (Rule F) and the Claims and Answer provisions of subsection (5) of Rule F are not to apply to any person who presents a claim to Turnaboat Services, Ltd. [responsible parties' claims service] for oil pollution damages as defined in the Oil Pollution Act of 1990, 33 U.S.C. § 2702, unless and until that person brings a lawsuit in any Court, at which time Plaintiffs must serve Notice on that person in accordance with Rule F(4) and thereupon that person shall file a claim and answer herein in accordance with Rule F(5).

Copies of the injunctions are attached as an Appendix.

The "responsible parties" felt this language of the injunctions implemented the claims presentation procedure of OPA 90 § 2713(a) and made the use of Supplemental Rule F procedure compatible with OPA 90.

In the case at bar, however, the district court in Puerto Rico took an entirely different approach. The court entered an injunction that required claimants to file their

claims in the limitation proceedings within fifty-one days, and no provision was included to allow claimants the opportunity to present claims to the vessel owners under OPA 90 § 2713(a). *See Complaint of MetLife Capital Corp.*, 132 F.3d 818 (1st Cir. 1997).

This difference in the form of injunctions (entered in Tampa and in Puerto Rico) is expected to receive focused attention by the Eleventh Circuit, and its analysis may prove of value to this Court in considering the petition for writ of certiorari.[7]

The district court in Tampa dismissed the consolidated limitation cases as to all claimants to the limited extent that claimants' claims were filed under OPA 90.[8]

The *amicus curiae* appealed the dismissal to the Eleventh Circuit, and the companion appeals of the other two vessel interests were consolidated therewith. The primary issue under consideration by the Eleventh Circuit is as follows:

> Whether vessel owners may use the admiralty limitation of liability procedure of Supplemental Rule F to allow for the efficient resolution in a single forum of all claims arising out of a maritime incident involving an oil spill.

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[7] The issue is also pending before the Second Circuit in *Complaint of Odin Marine Corp.*, case number 97-6266. Briefing is closed, but oral argument has not yet been scheduled. The injunction in *Odin Marine* was similar to that issued in the case of the *amicus curiae*.

[8] The cases were also dismissed as to the Florida Department of Environmental Protection on Eleventh Amendment grounds, but that is not an issue here.

Included within this broadly stated issue is the issue raised in the petition for writ of certiorari, whether Supplemental Rule F is an appropriate procedural device for seeking limitation under OPA 90 as well as under the Limitation Act.

Both statutes provide for limitation of liability, although the standards for limitation and the amount of limitation differ under the two regimes.[9]

A *concursus* of claims in a single forum is necessary to give effect to any limitation regime, whether under the Limitation Act (limitation to the value of a vessel) or under OPA 90 (limitation to $1,200 per gross ton of a vessel). This principal was recognized when the Limitation Act was first considered by this Court. The Limitation Act, in its original form, was void of any procedure to give it effect,[10] prompting this Court to observe as follows:

> Unless, therefore, the District Courts themselves can administer the law, we are reduced to the dilemma of inferring that the Legislature has

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[9] Under OPA 90, limitation is allowed unless the responsible party was grossly negligent or violated a federal regulation, 2704(c), and the amount is based on the size or carrying capacity of the discharging vessel, such as $1,200 per gross ton under § 2704(a)(1)(A). Under the Limitation Act, limitation is allowed if the owner can show that it lacked privity or knowledge of a cause of the accident, and the amount is based on the value of the vessel. 46 U.S.C. § 183.

[10] Procedure was added to the Limitation Act by Congress in 1936. Act of June 5, 1936, ch. 521, § 3, 49 STAT. 1480, 1479-81 (codified *as amended* at 46 U.S.C. § 185), 1936 A.M.C. 920, 922.

> passed a law which is incapable of execution. This is never to be done if it can be avoided.

The Norwich & N.Y. Transp. Co. v. Wright, 80 U.S. (13 Wall.) 104, 20 L. Ed. 585, 592 (1872).

Accordingly, the Court determined in its opinion the procedure for shipowners to follow, which included a *concursus* of claims in a single forum. *Id. See* Petition for Writ of Certiorari at p. 5 (setting forth the history and origins of Supplemental Rule F).

In its present form OPA 90 includes no procedural device for a "responsible party" to follow to seek limitation just as the Limitation Act included no procedure for vessel owners to follow to seek limitation. However, there is a difference between the state of the law in 1872 when *The Norwich* was before the Court and the state of the law today. There does now exist a suitable rule for administering OPA 90, Supplemental Rule F, which, applies whenever a vessel owner seeks to obtain "limitation of liability pursuant to statute." Supplemental Rule F(1). The injunction issued under Supplemental Rule F(3) in the case of the *amicus curiae* established a *concursus* of claims in a single proceeding, allowing execution of the limitation provisions of § 2704(a) of OPA 90, without interfering with the claims presentation provision of § 2713(a).

CONCLUSION

The *amicus curiae* submits that the Court should reserve ruling on the petition for writ of certiorari until the analysis of the Eleventh Circuit is available for consideration on the significant issue raised in the petition.[11]

Respectfully submitted,

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[11] It is not known when the Eleventh Circuit will render its decision in the consolidated cases. At oral argument on January 15, 1998, the undersigned counsel advised the panel that the Eleventh Amendment issue included in the cases might be affected by this Court's decision in *State of California, State Lands Commission v. Deep Sea Research, Inc.*, case no. 96-1400, and it is believed that the Eleventh Circuit might wait for such potential guidance. Additionally, the Clerk of the Eleventh Circuit, on April 10, 1998, issued a memorandum requesting supplemental briefing on the Eleventh Amendment issue that will take 50 days to accomplish.

APPENDIX

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

IN ADMIRALTY

IN THE MATTER OF THE COMPLAINT OF BOUCHARD TRANSPORTATION CO., INC., TUG CAPTAIN FRED BOUCHARD INC., AND B NO. 155 CORPORATION, FOR EXONERATION FROM OR LIMITATION OF LIABILITY AS OWNER OR AS OWNER *PRO HAC VICE* OF TUG CAPT. FRED BOUCHARD AND BARGE B. NO. 155.

CASE NO. 94-233-Civ-T-2iB

_____/

INJUNCTION

Plaintiffs, BOUCHARD TRANSPORTATION CO., INC., TUG CAPTAIN FRED BOUCHARD INC., and B NO. 155 CORPORATION (collectively "BOUCHARD"), having on February 9, 1994, filed a Complaint for exoneration from or limitation of liability in respect to losses and damages arising out of a voyage of Tug CAPT. FRED BOUCHARD and Barge B. NO. 155 on August 10, 1993, and BOUCHARD having stated in its Complaint the facts and circumstances upon which exoneration from or limitation of liability are claimed, and having filed an ad *interim* Stipulation of value, duly executed by BOUCHARD, as Principal, the performance of which has been secured in accordance with the rules and practice of

this Court, and it appearing that BOUCHARD desires to obtain a restraining order, it is

ORDERED that the further prosecution of any pending actions, suits or legal proceedings in any court whatsoever, and the institution and prosecution of any suits, actions, or legal proceedings of any nature or description whatsoever in any court whatsoever, except in this proceeding for exoneration from or limitation of liability, against BOUCHARD TRANSPORTATION CO., INC., TUG CAPTAIN FRED BOUCHARD INC., or B NO. 155 CORPORATION or against Tug CAPT. FRED BOUCHARD and Barge B. NO. 155 or other property or their underwriters in respect of any claim or claims arising out of or connected with the aforesaid voyage of August 10, 1993, be, and the same are hereby, stayed and restrained until the hearing and determination of this proceeding; and it is further

ORDERED, that the notice provision of subsection (4) of Rule F of the Supplemental Rules for Certain Admiralty and Maritime Claims (Rule F) and the Claims and Answer provisions of subsection (5) of Rule F are not to apply to any person who presents a claim to Turnaboat Services, Ltd. for oil pollution damages as defined in the Oil Pollution Act of 1990, 33 U.S.C. § 2702, unless and until that person brings a lawsuit in any Court, at which time Plaintiffs must serve Notice on that person in accordance with Rule F(4) and thereupon that person shall file a claim and answer herein in accordance with Rule F(5).

ORDERED that service of this Injunction as a restraining order may be made by mailing a copy of this

Injunction to the person or persons to be restrained or to their respective attorneys or representatives.

DONE AND ORDERED in Chambers at Tampa, Florida this 9th day of February , 1994

/s/ Thomas G. Wilson
UNITED STATES
MAGISTRATE JUDGE

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION
IN ADMIRALTY

IN THE MATTER OF THE COMPLAINT OF MARITRANS OPERATING PARTNERS LP and MARITRANS GENERAL PARTNER INC. FOR EXONERATION FROM OR LIMITATION OF LIABILITY AS OWNER OF THE TUG SEAFARER, Official No. 532672 and BARGE OCEAN 255, Official No. 534910.
_____/

Case No: 94-227Civ-T-2iB

INJUNCTION

The Plaintiff, Maritrans Operating Partners LP and Maritrans General Partner Inc. ("Maritrans"), having on February 8, 1994, filed a Complaint for exoneration from or limitation of liability in respect to losses and damages arising out of a voyage of the Tug SEAFARER and Barge OCEAN 255 on August 10, 1993, and Maritrans having stated in its Complaint the facts and circumstances upon which exoneration from or limitation of liability are claimed, and having filed an ad interim Stipulation of value, duly executed by Maritrans, as Principal, the performance of which has been secured in accordance with the rules and practice of this Court, and it appearing that Maritrans desires to obtain a restraining order, it is

ORDERED that the further prosecution of any pending actions, suits or legal proceedings in any court whatsoever, and the institution and prosecution of any suits, actions, or legal proceedings of any nature or description whatsoever in any court whatsoever, except in this proceeding for exoneration from or limitation of liability, against Maritrans or against the Tug SEAFARER and Barge OCEAN 255 in respect of any claim or claims arising out of or connected with the aforesaid voyage of August 10, 1993, be, and the same are hereby, stayed and restrained until the hearing and determination of this proceeding; and it is further

ORDERED, that the notice provision of subsection (4) of Rule F of the Supplemental Rules for Certain Admiralty and Maritime Claims (Rule F) and the claims and Answer provisions of subsection (5) of Rule F are not to apply to any person who presents a claim to Turnaboat Services, Ltd. for oil pollution damages, as that term is defined in the Oil Pollution Act of 1990, 33 U.S.C. § 2702, unless and until that person brings a lawsuit in any Court, at which time Plaintiff must serve Notice on that person in accordance with Rule F(4) and thereupon that person shall file a claim and answer herein in accordance with Rule F(5).

ORDERED that service of this Injunction as a restraining order may be made by mailing a copy of this Injunction to the person or persons to be restrained or to their respective attorneys or representatives.

DONE AND ORDERED in Chambers at Tampa, Florida this 8 day of February, 1994.

/s/ Thomas G. Wilson
UNITED STATES
MAGISTRATE
JUDGE

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Supreme Court, U.S.
FILED
MAY 29 1998
OFFICE OF THE CLERK

No. 97-1610

In the Supreme Court of the United States

OCTOBER TERM, 1997

BUNKER GROUP, INC., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in ruling that the concursus procedure under Rule F of the Supplemental Rules For Certain Admiralty and Maritime Cases does not apply to claims brought under the Oil Pollution Act of 1990, 33 U.S.C. 2701 *et seq.*

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is reported at 132 F.3d 818. The order of the district court (Pet. App. B1-B5) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 24, 1997. The petition for a writ of certiorari was filed on March 24, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners contend that the court of appeals was incorrect in ruling that the admiralty "concursus" procedure, Rule F of the Supplemental Rules For Certain Admiralty and Maritime Claims (Rule F),

does not apply in cases brought pursuant to the Oil Pollution Act of 1990, 33 U.S.C. 2701 *et seq.* (OPA).

1. a. The Limitation of Shipowner's Liability Act of 1851 (Limitation Act), 46 U.S.C. App. 181-196, allows a shipowner to limit his or her liability with respect to claims arising out of a vessel casualty, not involving death or personal injury, to the post-accident value of the ship plus "her freight then pending." 46 U.S.C. App. 183(a). Paragraph (1) of Rule F provides that, within six months of receiving a claim in writing, "any vessel owner may file a complaint in the appropriate district court, as provided in subdivision (9) of this rule, for limitation of liability pursuant to statute." Paragraph (2) of Rule F provides that "[t]he complaint shall set forth the facts on the basis of which the right to limit liability is asserted and all facts necessary to enable the court to determine the amount to which the owner's liability shall be limited." If the vessel owner complies with the requirements for timely filing of a complaint, "all claims and proceedings against the owner or the owner's property with respect to the matter in question shall cease." Rule F(3). The court then has the authority to issue notice to all claimants with respect to which the vessel owner seeks limitation of liability, Rule F(4), to require the filing of claims in a single consolidated procedure, Rule F(5), and, upon determining the vessel owner's liability, to award pro rata shares to the claimants "in proportion to the amounts of their respective claims," Rule F(8). The procedure provides a "concursus" of all claims against the vessel owner arising out of claims consistent with limitations on vessel owner liability provided by statute.

b. In 1990, Congress enacted the OPA. That legislation followed the catastrophic marine and environ-

mental disaster involving the *Exxon Valdez*, which discharged more than 11 million gallons of crude oil into Prince William Sound, Alaska. The OPA provides a comprehensive liability scheme for oil spills, applying to cases arising from such accidents, "[n]otwithstanding any other provision or rule of law." 33 U.S.C. 2702(a). Under the OPA, "each responsible party for a vessel or a facility from which oil is discharged * * * is liable for the removal costs and damages." 33 U.S.C. 2702(a). Included in the definition of "responsible party" are vessel owners, operators, and demise charterers. 33 U.S.C. 2701(32)(A).

In addition to changing the parties liable for oil spill damages, the OPA also abandons the Limitation Act's value-of-the-vessel-plus-pending-freight liability formula. "[T]he OPA contemplates a strict liability regime with statutory limits of at least $2 million for tanks vessels and $.5 million for all other vessels. 33 U.S.C. §§ 2702, 2704. Moreover, in certain instances, the OPA imposes virtually unlimited liability on the responsible party. *See* 33 U.S.C. § 2704(c)." Pet. App. A9. Moreover, the OPA liability provisions do not affect the imposition of additional liability under "State law, including common law." 33 U.S.C. 2718(a)(2).

2. On January 7, 1994, the tow line connecting the tug *M/V Emily S* and the tank barge *Morris J. Berman* parted. The tank barge grounded off the coast of San Juan, Puerto Rico, causing a large oil spill. Pet. App. A3. On January 8, 1994, the Commonwealth of Puerto Rico filed suit in the District of Puerto Rico federal court under the OPA, general maritime law, and Puerto Rico law to recover economic losses and natural resource damages. Thereafter, the owners, operators, and charterers of the tug and the barge

filed complaints for exoneration from, or limitation of, liability under the Limitation Act and Rule F. *Id.* at A3.[1]

On August 25, 1994, the district court issued a monition order, setting a deadline of October 15, 1994, for claimants to file their claims in the Limitation Act cases. Pet. App. A4. The United States and the Commonwealth of Puerto Rico both filed protective claims in the Limitation Act cases to recover their respective damages resulting from the oil spill, including claims based on the OPA. Hilton International of Puerto Rico, Inc. (Hilton), Hotel Development Corporation (HDC), and Puerto Rico Tourism Company (Tourism) each filed their respective claims in the two limitation cases under seal. *Id.* at A4-A5.

On October 17, 1994, Hilton and HDC filed a "Joint Motion to Amend Order and Notice; To Stay Proceedings; Or In The Alternative, To Relax The Monition Period, And Memorandum of Law." On the same day, Tourism and HDC jointly filed a "Petition For Dismissal Or Stay Of Proceedings." C.A. App. A189, A211. In those motions, Hilton, HDC, and Tourism sought relief from the monition and injunction so that they could pursue their respective OPA claims administratively before the National Pollution Funds Center (NPFC), which administers the Oil Spill Liability Trust Fund (OSLTF), and thereby not be

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[1] The Bunker Group, Inc. (BGI), Bunker Group Puerto Rico, Inc. (BGPR) and New England Marine Services, Inc. (NEMS), collectively referred to as the "Bunker Group," were the plaintiffs in that action brought pursuant to Rule F of the Supplemental Admiralty Rules. MetLife Capital Corporation (MetLife), the owner of the tug, filed a separate Limitation Act action, but has not sought further review of the court of appeals' decision.

forced into litigation prior to the NPFC's review of their claims. In response to those motions, the United States and the Commonwealth each filed briefs arguing that the OPA claims are not subject to the Limitation Act and the procedures of Rule F, and that those claims may be asserted independently of the limitation proceedings. *Id.* at A60 (Docket No. 230); A211. Limitation plaintiffs MetLife and Bunker Group responded to those motions by arguing that OPA claims are subject to the Limitation Act and Rule F concursus. *Id.* at A57 (Docket Nos. 193, 195).

On June 28, 1996, the district court issued an order holding that the OPA claims are not subject to the Limitation Act or Rule F concursus. Pet. App. B1-B5.[2]

3. The court of appeals affirmed (Pet. App. A1-A13), holding that the OPA partially repealed the Limitations Act; and to the extent that the Limitations Act no longer applied to oil spill cases, "the procedural rules incorporated into the Limitation Act are inapplicable as well." *Id.* at A8.

The court of appeals acknowledged the judicial reluctance to find a repeal by implication. Pet. App. A9 (citing *TVA* v. *Hill*, 437 U.S. 153, 189 (1978)). It nonetheless observed that the OPA contains a num-

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[2] Following the issuance of that order, Hilton withdrew its sealed limitation claim to proceed administratively before the NPFC. C.A. App. A80 (Docket No. 363). On January 7, 1997, the United States filed an independent action under the OPA against the vessel owners, operators, charterers and various other parties. The Commonwealth, having sued in parens patriae on behalf of a number of Puerto Rico agencies, subsequently assumed the claims of HDC and Tourism in its Third Amended Complaint.

ber of provisions expressly repealing provisions of the Limitation Act in the context of oil spills (*id.* at A8):

> In addition to the "notwithstanding" clause, at least four other provisions in the statute explicitly repeal the Limitation Act with respect to certain types of claims. *See* 33 U.S.C. §§ 2702(d)(1)(A) (repealing the Limitation Act as to third parties solely responsible for a spill); 2718(a) (repealing the Limitation Act as to state and local statutory remedies); 2718(c)(1) (repealing the Limitation Act as to additional liability imposed by the United States, any state, or political subdivision); 2718(c)(2) (repealing the Limitation Act as to fines and penalties).

In addition, the court of appeals found that "several key provisions of the two statutes are plainly inconsistent." *Id.* at A9. The court of appeals noted that the liability schemes of the two statutes differ: "the Limitation Act limits the shipowner's liability to the post-accident value of the vessel plus pending freight, 46 U.S.C. § 183, while the OPA contemplates a strict liability regime with statutory limits of at least $2 million for tanks vessels" and "virtually unlimited liability on the responsible party" in certain circumstances. *Ibid.* (citing 33 U.S.C. 2702 and 2704). Moreover, "the provisions on jurisdiction are in obvious tension"; whereas only the federal courts may entertain Limitation Act suits, both federal and state courts have jurisdiction to adjudicate oil spill cases. *Ibid.*

In the court of appeals, petitioners had argued that, even if the OPA supersedes the Limitation Act, nothing in the OPA precludes a concursus as provided under Rule F. The court of appeals rejected that

contention, finding the provisions of Rule F to be incompatible with litigation brought under the OPA. Pet. App. A11-A13. With respect to venue, the court compared Rule F with the OPA. *Id.* at A11. Rule F(9) permits a limitation action to be brought only in the district where the vessel has been seized; or, if the vessel has not been seized, where the owner has been sued; or, in the absence of vessel seizure or suit, where the vessel is located; "but, if the vessel is not within any district and no suit has been commenced in any district, then the complaint may be filed in any district." Under the OPA, venue will simultaneously lie in any district where the discharge occurred; where damages were incurred; or where the defendant resides (or may be found), has its principal office, or has a registered agent for service of process. 33 U.S.C. 2717(b). "Thus, the OPA offers claimants a much broader choice of forums while Rule F's venue requirements are significantly more restrictive." Pet. App. A11-A12.

The court of appeals similarly found the time limitations for filing claims under Rule F to be incompatible with the OPA. Under Rule F(4), the district court may use its discretion to cut off claims, so long as claimants are given at least thirty days from the monition notices. OPA, however, gives claimants three years to commence an action to recover removal costs and damages from a responsible party, or six years to seek recovery against the OSLTF. *Id.* at A12 (citing 33 U.S.C. 2712, 2717). The court expressed particular "concern" that "the shortened claims period under Rule F * * * would interfere with the United States' subrogation rights under the OPA." *Ibid.* The court reasoned that those time limitations would potentially cause the United States

to "be denied access to the proceedings against the responsible party, and consequently, the Fund will bear the financial burden of these late claims." *Ibid.*

Finally, the court of appeals found that the concursus provision in Rule F(3) was inconsistent with the OPA procedures. Under OPA, the court of appeals observed that (Pet. App. A13):

> all claims for removal costs or damages [must] be presented first to the responsible party or guarantor. *See* 33 U.S.C. § 2713(a). If the responsible party denies liability or the claim is not settled within 90 days, the claimant may proceed against the responsible party in court or present the claim to the Fund. *See id.* § 2713(c). In some enumerated instances, claims may be presented directly to the Fund without first presenting them to the responsible party. *See id.* § 2713(b). "The purpose of the claim presentation procedure is to promote settlement and avoid litigation." *Johnson* v. *Colonial Pipeline Co.*, 830 F. Supp. 309, 310 (E.D. Va. 1993).

In contrast, Rule F(3) promptly "forces all claimants into litigation against the vessel owner." *Ibid.* "In view of these inconsistencies, we conclude that Rule F concursus even if independent of the Limitation Act is inapplicable to OPA claims." *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any court of appeals. Accordingly, further review is unwarranted.

1. When the provisions of two statutes are irreconcilable, the latter statute impliedly repeals the

earlier one to the extent of the conflict. See, *e.g.*, *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 154 (1976). The two statutes under discussion here orient the course of litigation in different directions. The Limitation Act, enacted 148 years ago, was designed to encourage the fledgling ship building and shipping industries. See *Hartford Accident & Indem. Co.* v. *Southern Pac. Co.*, 273 U.S. 207, 214 (1927). It accordingly limits the liability of shipowners in certain circumstances. The OPA was designed to assure that, with respect to a particular species of marine accident, cleanup would be prompt and liability would be independent of any liability of the owners and operators under the Limitation Act.

The scheme of the OPA thus conflicts with the Limitation Act with respect to oil spills. The statute begins by providing that the OPA applies "[n]otwithstanding any other provision or rule of law." 33 U.S.C. 2702(a). And, "[e]xcept as otherwise provided," the OPA expressly reserves the applicability of the Limitation Act for general maritime law claims, such as personal injury claims, arising from an oil spill. 33 U.S.C. 2751(e). Those phrases manifest Congress's intent for the OPA to displace any conflicting earlier laws with respect to liabilities created under the OPA. The court of appeals meticulously compared the requirements of the OPA and the Limitation Act and applied the correct legal standard to determine whether the Limitations Act had any further role in cases cognizable under the OPA. Its conclusion that the OPA supersedes the Limitation Act for suits to recover oil spill cleanup and oil spill damages is consistent with the decisions of other courts that compare the Limitation Act to other subsequently

enacted statutes.[3] The OPA "completely supersedes the 1851 statute with respect to oil pollution." S. Rep. No. 94, 101st Cong., 1st Sess. 14 (1989).

2. Moreover, petitioners offer no basis for further review of the court of appeals' holding with respect to the Limitation Act. Although the petition formally presents an issue regarding the displacement of the Limitation Act (Pet. i, question 2), the petition does not identify any specific Limitation Act provision, rendered inapplicable in this dispute by the court of appeals' decision, that petitioners wish to reinstate and have applied to this proceeding. Petitioners, in fact, expressly concede that the OPA controls with respect to the parties who are liable and the extent of their liability. Pet. 4-5.

3. With respect to petitioners' effort to seek relief specifically in the concursus process of Rule F(3) (see Pet i, question 1), the court of appeals correctly concluded that Rule F concursus is inconsistent with the comprehensive recovery scheme under the OPA. Congress enacted the OPA largely to provide claimants who incur removal costs or damages with appropriate avenues of recovery following an oil spill, including a claims procedure. A claimant must first present his claim to the responsible party and, if the responsible party refuses to pay or the claim is not resolved in 90 days, the claimant may proceed with an administrative adjudication of the claim by the NPFC for payment from the OSLTF. 33 U.S.C. 2713. This

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[3] The courts of appeals have reached similar conclusions on the interplay between the Limitation Act and the Federal Water Pollution Control Act, 33 U.S.C. 1251 *et seq.*, *In re Oswego Barge Corp.*, 664 F.2d 327, 340 (2d Cir. 1981), and the Trans-Alaska Pipeline Authorization Act, 43 U.S.C. 1651 *et seq.*, *In re Glacier Bay*, 944 F.2d 577, 583 (9th Cir. 1991).

process of claims adjudication is intended to avoid having claimants litigate to recover their damages. Under the OPA, the United States obtains subrogation rights for the claims paid by the NPFC. 33 U.S.C. 2715. That process promotes fairly prompt and efficient payment of claims, and claimants need not become embroiled in litigation.

The filing of a Limitation Act proceeding has the opposite effect and is similar to a proceeding in bankruptcy: the vessel owner or operator puts forth its interest in the vessel and pending freight as security, and the district court issues monition and injunction orders to force claimants to litigate the right to that limited fund, by requiring that they make appearances to answer the limitation complaint and file their claims. As the court of appeals observed (Pet. App. A12-A13), imposing the concursus process here would impermissibly convert the government's statutory subrogation right under the OPA into a matter of district court discretion. Even if the court consistently exercised its discretion to enlarge the monition period, the government's collection effort in many cases could be prejudiced in a manner inconsistent with the provisions of the OPA. See *ibid.*

4. Petitioners can point to no conflict with a decision of any other court of appeals.[4] Absent a conflict, the question of whether admiralty concursus procedure should be available to shipowners in oil pollution cases does not warrant this Court's review. To a

[4] The issue of whether concursus applies to OPA claims for removal costs and damages has been presented in two recent appeals: *In re Complaint of Odin Marine Corporation*, No. 97-6266 (2d Cir.), appeal dismissed, May 20, 1998; *In re Complaint of Bouchard Transportation Company*, No. 96-3494 (11th Cir.), appeal pending.

large extent, parties in OPA cases can reduce the litigation burdens by invoking the procedures generally available to litigants in the federal court system: consolidation under Federal Rule of Civil Procedure 42; transfer for *forum non conveniens* under 28 U.S.C. 1404(a); and multidistrict litigation under 28 U.S.C. 1407. To the extent that those procedures will not match the efficiency or convenience of a concursus from the defendant's perspective, that result is dictated by the expanded venue, liability, and deadline provisions of the OPA. In this particular case, the filing of the petitioners' Limitation Act action, and the subsequent monition notices, triggered the filing of protective claims in the district court. Petitioners have not explained why the practical benefits of concursus have not already been achieved in those consolidated proceedings.[5]

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[5] Recognizing, perhaps, that they do not present conventional grounds for certiorari, petitioners aver that the proceedings below have "departed from the accepted and usual course of judicial proceedings." Pet. 3 (citing Sup. Ct. R. 10). The record does not support that assertion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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